Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

29 March 2012*

(VAT — Sixth Directive — Article 17(2)(b) — Taxation of a product imported from a third country — National legislation — Right to deduct VAT on importation — Condition — Actual payment of VAT by the taxable person)

In Case C-414/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 30 July 2010, received at the Court on 19 August 2010, in the proceedings

Véleclair SA

v

Ministre du Budget, des Comptes publics et de la Réforme de l'État,

THE COURT (First Chamber),

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

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 12 October 2011,

after considering the observations submitted on behalf of:

— Véleclair SA, by É. Arcil, lawyer,

— the French Government, by N. Rouam and G. de Bergues, acting as Agents,

— the German Government, by C. Blaschke and T. Henze, acting as Agents,

— the Netherlands Government, by C. Wissels, acting as Agent,

— the Portuguese Government, by S. Jaulino and L. Ines Fernandes and R. Campos Laires, acting as Agents,

— the European Commission, by D. Recchia, C. Soulay and F. Dintilhac, acting as Agents,

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 17 November 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 17(2)(b) 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 Véleclair SA and the ministre du Budget, des Comptes publics et de la Réforme de l'État (Minister for the Budget, Public Accounts and Civil Administration) concerning national legislation making the exercise of the right to deduct value added tax ('VAT') on importation conditional upon the actual payment of that tax by the taxable person.

Legal context

The Sixth Directive

3 Article 10(1) of the Sixth Directive provides:

'(a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.'

4 According to Article 10(2) and (3) of the Sixth Directive:

'2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed.

…

By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either:

— no later than the issue of the invoice or of the document serving as invoice, or

— no later than receipt of the price, or

— where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.

3. The chargeable event shall occur and the tax shall become chargeable when the goods are imported. Where goods are placed under one of the arrangements referred to in Article 7(3) on entry into the Community, the chargeable event shall occur and the tax shall become chargeable only when the goods cease to be covered by those arrangements.

However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and the tax shall become chargeable when the chargeable event for those Community duties occurs and those duties become chargeable.

Where imported goods are not subject to any of those Community duties, Member States shall apply the provisions in force governing customs duties as regards the occurrence of the chargeable event and the moment when the tax becomes chargeable.'

5 Under Article 17(1) and (2) of the Sixth Directive:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

(b) value added tax due or paid in respect of imported goods within the territory of the country;

…'

6 According to Article 18(1)(b) and (2) of the Sixth Directive:

'1. To exercise his right of deduction, a taxable person must:

…

(b) in respect of deductions pursuant to Article 17(2)(b), hold an import document specifying him as consignee or importer and stating or permitting the calculation of the amount of tax due;

…

2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

…'

7 Article 21(2) of the Sixth Directive states:

'The following shall be liable to pay value added tax:

…

2. [O]n importation: the person or persons designated or accepted as being liable by the Member States into which the goods are imported.'

National legislation

8 Article 271(II)(1) of the Code général des impôts (General Tax Code) ('the CGI') states:

'In so far as the goods and services are used for their taxable transactions, and provided that VAT is deductible on those transactions, the tax which the persons liable may deduct is, inter alia:

…

(b) the tax which is levied on importation.

…'

9 Article 291(I)(2)(a) of the CGI states:

'Importation of goods means:

(a) the entry into France of goods, originating in or coming from a State or territory which is not part of the European Community and which have not been authorised for free circulation …'

10 Article 293(A)(1) of the CGI provides:

'Upon importation, the chargeable event shall occur and the tax shall become chargeable at the time when goods are regarded as imported, within the meaning of Paragraph 2 of Section I of Article 291.

…

The tax must be paid by the person designated as the true consignee of the goods on the importation declaration.

…'

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

11 Between 1992 and 1995, Véleclair imported bicycles, declaring that those bicycles came from Vietnam. By contrast, the French customs authorities considered that those bicycles had in fact originated in China and, consequently, drew up a statement to the effect that a false declaration of origin had been made. As a result, Véleclair was subject to customs duties and anti-dumping duties in the amount of almost EUR 4 million, those duties being themselves liable to VAT in the amount of EUR 735 437.

12 Véleclair did not pay that VAT and the customs authorities communicated that information to the tax authorities, who then held a claim against that company. By order of 12 February 1999, the official receiver held that that claim had lapsed on the ground that it had not been definitively declared within 12 months of the publication of Véleclair's compulsory administration. That decision was upheld at final instance by the Cour de cassation (Court of Cassation) on 8 July 2003.

13 Véleclair filed an application for a refund, in the amount of EUR 723 503.37, corresponding to the deductible VAT credit to which it believed itself to be entitled on 31 December 1997 by virtue of the increase in VAT on importation on non-recovered duties.

14 That application was rejected by the tax authorities on the ground that, according to the CGI, the deductibility of VAT on importation is conditional upon its actual prior payment. The position defended by the tax authorities was upheld at first instance by the tribunal administratif d'Orléans

(Administrative Court, Orléans). After the appeal brought against that decision before the cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes) was also dismissed, Véleclair brought an appeal in cassation before the Conseil d'État (Council of State).

15 Before that court, Véleclair submitted that the exercise of its right to deduction could not be made conditional upon the actual prior payment of the tax for which it was liable on the ground that Article 271(II)(1)(b) of the CGI, providing that the right to deduct VAT is conditional upon its actual receipt by the tax authorities and not merely on the fact that it is chargeable, is incompatible with Article 17(2)(b) of the Sixth Directive.

16 In those circumstances the Conseil d'État decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 17(2)(b) of the Sixth Directive permit a Member State to make the right to deduct [VAT] on importation conditional, regard being had in particular to the risk of tax evasion, upon the actual payment of that tax by the taxable person, where the taxable person for the purposes of [VAT] on importation and the holder of the corresponding right to deduction are, as in France, the same person?'

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 17(2)(b) of the Sixth Directive is to be interpreted as allowing a Member State to make the right to deduct VAT on importation conditional upon the actual prior payment of that tax by the taxable person where that taxable person is also the holder of the right to deduction.

18 In order to answer that question, first, it must be borne in mind that, according to the wording of Article 17(2)(b) of the Sixth Directive, the taxable person is to be entitled to deduct VAT 'due or paid' in respect of imported goods within the territory of the country.

19 Thus, the wording of that provision, which repeats the expression used in Article 17(2)(a) of the Sixth Directive, according to which taxable persons are to be entitled to deduct VAT 'due or paid' in respect of goods supplied or to be supplied to them, clearly provides that the taxable person's right to deduct that tax concerns not only VAT which he has paid but also VAT which is due, that is, which is still to be paid.

20 As the Advocate General observed in points 56 to 58 of her Opinion, the term 'due' refers to an enforceable tax claim and therefore requires that the taxable person has an obligation to pay the amount of VAT which he seeks deduction of as input VAT.

21 First, it should be added that, if the EU legislature had wished to make the right to deduct VAT on importation conditional upon the actual prior payment of that VAT, it could have done so explicitly, for example by removing the term 'due' from Article 17 of the Sixth Directive.

22 Second, it follows from a combined reading of Article 17(1) and Article 10(3) of the Sixth Directive that the creation of the right to deduct VAT is independent of whether payment of the consideration due in respect of the goods imported has taken place.

23 It follows, applying Article 17(2)(b) of the Sixth Directive, that the right to deduct VAT on importation cannot, in principle, be made conditional upon the actual prior payment of that VAT.

24 Second, it must be stated that that interpretation of Article 17(2)(b) of the Sixth Directive is borne out by other provisions of that directive.

25 First, Article 17(2)(a) of the Sixth Directive, which also uses the terms 'due or paid', as shown in paragraph 19 of this judgment, must be understood as meaning that the question whether the VAT due on the earlier or later sale of the goods concerned has or has not been paid to the public purse is irrelevant to the taxable person's right to deduct (see, to that effect, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 54).

26 Second, as the Advocate General observed in point 37 of her Opinion, Article 18(1)(b) of the Sixth Directive, entitled 'Rules governing the exercise of the right to deduct', simply provides that, to exercise his right to deduct VAT on importation, a taxable person only has to hold an import document specifying him as consignee or importer and 'stating or permitting the calculation of' the amount of tax due. It follows that the exercise of the right to deduct VAT is not conditional upon the actual prior payment of VAT on importation.

27 Third, it should be stated that the above interpretation complies with the objectives of the Sixth Directive in so far as it enables authorities to ensure that the right to deduct, which in principle may not be limited, remains an integral part of the VAT scheme and can continue to be exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, to that effect, Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 47).

28 That interpretation, moreover, is the most appropriate for ensuring compliance with the principle of fiscal neutrality.

29 In that regard, it should be borne in mind that the rules governing deduction are meant to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that those activities are themselves subject to VAT (see, inter alia, *Kittel and Recolta Recycling*, paragraph 48 and the case-law cited).

30 For reasons set out more fully by the Advocate General in points 39 to 42 of her Opinion, making the right to deduct VAT on importation conditional upon the actual prior payment of that VAT would lead to the taxable person being subject, for a certain period, to an economic burden which should not be his and the avoidance of which is the specific aim of the rules governing deduction.

31 That interpretation is not undermined by the argument that, without the actual prior payment of VAT on importation, there would be a risk of VAT evasion or abuse.

32 First, as is clear from settled case-law, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive. It is for the person requesting deduction of VAT to prove that the conditions for receipt of that deduction have been met and if the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively. In addition, it is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence from the case-file, that that right is being relied on for fraudulent ends (see, inter alia, *Kittel and Recolta Recycling*, paragraphs 54 and 55 and the case-law cited).

33 Next, it cannot legitimately be claimed that an importation is an operation in respect of which there is a heightened risk of tax evasion or abuse. The importation of goods is a physical act which is witnessed and can be confirmed by the competent authorities from the presence of those goods at customs.

34 Lastly, the fact that the taxable person for the purposes of VAT on importation is also the holder of the right to deduct that VAT does not seem likely to increase the risk of VAT evasion or abuse. On the contrary, as the European Commission has pointed out, the fact that one and the same person is both the taxable person for the purposes of VAT and the holder of the right to deduct is comparable to the situation in the context of the reverse charge procedure provided for in the Sixth Directive. As

the EU legislature reiterated in Recital 42 in the preamble to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), that system enables authorities, inter alia, to counter the tax evasion and avoidance observed in certain types of transactions.

35 Having regard to all of the foregoing, the answer to the question referred is that Article 17(2)(b) of the Sixth Directive must be interpreted as not allowing a Member State to make the right to deduct VAT on importation conditional upon the actual prior payment of that tax by the taxable person where that taxable person is also the holder of the right to deduction.

Costs

36 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:

Article 17(2)(b) 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 must be interpreted as not allowing a Member State to make the right to deduct value added tax on importation conditional upon the actual prior payment of that tax by the taxable person where that taxable person is also the holder of the right to deduction.

[Signatures]