JUDGMENT OF THE COURT (Second Chamber)

14 September 2006 *

In Joined Cases C-181/04 to C-183/04,

REFERENCES for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decisions of 3 March 2004, received at the Court on 19 April 2004, in the proceedings

Elmeka NE

v

Ipourgos Ikonomikon,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Silva de Lapuerta, P. Kūris and G. Arestis (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: H. von Holstein, Deputy Registrar,

* Language of the case: Greek.

having regard to the written procedure and further to the hearing on 8 September 2005,

after considering the observations submitted on behalf of:

— the Greek Government, by M. Apessos, S. Spiropoulos, I. Bakopoulos and S. Kala, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and G. De Bellis, avvocato dello Stato,

— the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 1 December 2005,

gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation of Article 15(4)(a), (5) and (8) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145,

p. 1), as amended by Council Directive 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47, 'the Sixth Directive') as well as the principles of protection of legitimate expectations and legal certainty.

2 These references were made in the course of proceedings between the company Elmeka NE ('Elmeka') to the Ipourgos Ikonomikon (Minister for Economic Affairs) concerning the refusal of the latter to exempt from value added tax ('VAT') operations giving rise to freightage for the carriage of petroleum products for provisioning sea-going vessels.

Legal context

Community legislation

3 Article 15 of the Sixth Directive reads:

'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:

...

4. the supply of goods for the fuelling and provisioning of vessels:

   (a) used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

   (b) used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships' provisions;

...

5. the supply, modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) and the supply, hiring, repair and maintenance of equipment — including fishing equipment — incorporated or used therein;

...

8. the supply of services other than those referred to in paragraph 5, to meet the direct needs of the sea-going vessels referred to in that paragraph or of their cargoes;

...'

National legislation

4 Article 22(1) of Law No 1642/1986 on the application of VAT and other provisions (FEK (Official Gazette), 125 A'), which transposes the Sixth Directive into Greek law, in the version in force at the material time, reads in part as follows:

'(1) The following shall be exempt from tax:

(a) the supply and the import of vessels which are intended to be used in merchant shipping and in fishing by taxable persons subject to the normal VAT system or for other utilisation or for breaking up or for use by the armed forces and the State generally, the supply and the import of rescue and salvage vessels, and of objects and materials provided that they are intended to be incorporated or used in the vessels referred to in this subparagraph. Private vessels intended for recreation or sport are excluded;

...

(c) the supply and the import of fuel, lubricants, food supplies and other goods intended for the fuelling and provisioning of the vessels and aircraft which are exempted under subparagraphs (a) and (b). The exemption shall be limited to fuel and lubricants in the case of vessels used for domestic merchant shipping or other domestic use and fishing vessels which fish in Greek territorial waters;

(d) the chartering of vessels and the hiring of aircraft, where they are intended for the further carrying out of taxable transactions or of transactions exempted with a right to deduct the input tax. The chartering or hiring of private vessels or aircraft intended for recreation or sport is excluded.

...'

The main proceedings and the questions referred for a preliminary ruling

5 The company Elmeka operates a tanker which carries petroleum products within Greece on behalf of various charterers that trade in liquid fuel.

6 In the course of a fiscal audit of Elmeka's books and accounting documents for the tax years 1994, 1995 and 1996, it was found that one of its charterers/suppliers was the Panamanian company Oceanic International Bunkering SA ('Oceanic'), whose business is trading in petroleum products. It was also found that Elmeka had not charged VAT on the gross freightage it levied on each bill of lading issued for the carriage of petroleum products intended for the provisioning of vessels within Greece on behalf of Oceanic, on the ground that those transactions were exempted from VAT.

7 In a letter to Dimosia Ikonomiki Ipiresia Ploion Piraios (State Financial Service for Shipping, Piraeus, 'the Piraeus tax authority') of 21 June 1994, Elmeka asked whether, in relation to the provisioning by its tanker, on behalf of Oceanic, of vessels sailing on foreign voyages and transporting fuel from refineries located along the roadstead of the port of Piraeus, it had a legal obligation to charge VAT on the bill of lading

issued to Oceanic, or if it was exempted — and, if so, under what procedure — on the basis of Law No 1642/1986. In response to this request, the Piraeus tax authority stated that the bills of lading in question were exempted from VAT.

8 Following the abolition, with effect from 1 January 1993, of the VAT exemption in respect of supplies of services for the transport of petroleum products, the services supplied by Elmeka became subject to VAT because they took place within Greece, irrespective of the fact that the recipient of those services was established outside the Community. In those circumstances, the competent tax authority charged Elmeka, by way of three decisions pertaining to the three tax years in issue, namely the years 1994 (Case C-183/04), 1995 (Case C-182/04) and 1996 (Case C-181/04), the difference in the main tax payable, together with an increase thereof for making a wrong declaration in respect of each of the years concerned and a fine.

9 Elmeka challenged those decisions before the Diikitiko Protodikio Piraios (Administrative Court of First Instance, Piraeus). Its action having been dismissed, the company then appealed to the Diikitiko Efetio Piraios (Administrative Appeal Court, Piraeus) which, having set aside the judgment delivered at first instance, accepted that in the circumstances, where the active conduct of the tax authorities of Piraeus had given the taxable person the long-standing and legitimate conviction that he was not subject to VAT, with the consequence that he did not pass this tax on to the consumer, he was not liable to pay the tax if the subsequent charging of the tax threatened the financial stability of his business. However, this ground of annulment was rejected because Elmeka had not provided concrete evidence in relation to its financial situation and, consequently, had failed to fulfil one of the conditions necessary for the application of the rule relating to the existence of a long-standing and legitimate conviction. The Diikitiko Efetio Piraios also ruled that the transport of fuel by Elmeka was not covered by Article 22(1)(c) of Law

No 1642/1986, and that Decision No 6 of the competent tax authority of 5 June 1997 had rightly required Elmeka to pay the VAT. The appeal was thus rejected on this point.

10 Elmeka then lodged an appeal against that judgment with the Simvoulio tis Epikratias, which decided to stay the proceedings and to refer the following questions, which are formulated in identical terms in each of the cases C-181/04 to C-183/04, to the Court of Justice for a preliminary ruling:

'(1) Does Article 15(4)(a) of the Sixth Directive ... , to which Article 15(5) of that directive refers, concern the chartering of both vessels used on the high seas which carry passengers for reward and vessels used for the purpose of commercial, industrial or fishing activities, or does it concern the chartering of vessels used on the high seas alone, when, in the latter case, Article 22(1)(d) of Law No 1642/1986 appears wider than the directive as regards the category of vessels to which the chartering relates?

(2) For the exemption from tax in accordance with Article 15(8) of the Sixth Directive, is the service required to be supplied to the vessel owner himself, or is the exemption granted also in respect of a service supplied to a third party, subject only to the condition that it meets the direct needs of the vessels referred to in Article 15(5), that is to say of the vessels covered by Article 15(4)(a) and (b)?

(3) Under the Community rules and principles which govern [VAT], is it permitted, and subject to what conditions, for tax to be charged for a past period where the

person liable did not pass tax on to the other contracting party during that period, and, therefore, tax was not paid to the State, because of the conviction of the person liable, brought about by conduct of the tax authorities, that he did not have to pass on the tax?'

11 By order of the President of the Court of 2 June 2004 Cases C-181/04 to C-183/04 were joined for the purposes of the written and oral procedure and of the judgment.

The questions

The first question

12 In its first question, the referring court asks in essence whether the criterion of use 'on the high seas' referred to in Article 15(4)(a) of the Sixth Directive, to which Article 15(5) refers, relates only to vessels which carry passengers for reward or whether it also refers to vessels used for the purpose of commercial, industrial or fishing activities.

13 The Greek Government and the Commission of the European Communities agree that Article 15(4)(a) of the Sixth Directive concerns vessels only in so far as they are used on the high seas and carry passengers for reward, or are used for the purpose of

commercial, industrial or fishing activities. The Italian Government, by contrast, considers that it must be interpreted as meaning that the exemption it lays down concerns, on the one hand, vessels used on the high seas that carry passengers for reward, and, on the other, vessels used for the purpose of commercial, industrial or fishing activities.

14 In this regard, even if certain language versions of Article 15(4)(a) of the Sixth Directive lend themselves to different interpretations, the scheme and purpose of the article suggest that the criterion of 'use on the high seas' applies to all the vessels mentioned in the said provision. It is clear from the title of that article, 'Exemption of exports from the Community and like transactions and international transport', that it is intended to exempt provisioning, and, under certain conditions, supplies of goods for sea-going vessels from VAT. Applying the criterion of 'use on the high seas' does not enable exemption to be given for sea-going vessels used for the purpose of commercial, industrial or fishing activities unless those activities take place on the high seas. If this provision were not to be understood as referring only to vessels used on the high seas, then Article 15(4)(b), which provides for such an exemption for vessels used for inshore fishing, would be superfluous.

15 Furthermore, interpreting Article 15(4)(a) of the Sixth Directive as referring only to vessels used on the high seas is consistent with the case-law of the Court of Justice, which calls for VAT exemptions to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is to be levied on each service supplied for consideration by a taxable person (see in particular Case C-185/89 *Velker International Oil Company* [1990] ECR I-2561, paragraph 19, and Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraph 25).

16 The answer to the first question must therefore be that Article 15(4)(a) of the Sixth Directive, to which Article 15(5) refers, applies not only to vessels used on the high seas for the carriage of passengers for reward, but also to vessels used on the high seas for the purpose of commercial, industrial or fishing activity.

The second question

17 In its second question, the referring court asks essentially whether the exemption provided for in Article 15(8) of the Sixth Directive covers only the supply of services for the direct needs of sea-going vessels, referred to in Article 15(5), and of their cargo and which are intended for the shipowner himself, or whether this exemption also covers such supplies of services to a third party.

18 In this regard, it must be borne in mind that the cases pending before the referring court have as their subject-matter the carriage of fuel by Elmeka on behalf of Oceanic, which sells it to the owners of the vessels in question. Thus, Elmeka supplies its services not directly to the shipowners but to Oceanic, which itself effects delivery of the goods to the shipowners.

19 The Greek and Italian Governments, as well as the Commission, take the view that in order to benefit from the exemption laid down in Article 15(8) of the Sixth Directive the services must be supplied to the shipowner himself.

20 It is appropriate to recall that exemptions are 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 C-2/95 *SDC* [1997] ECR I-3017, paragraph 21; Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 25; and *Cimber Air*, paragraph 23). Furthermore, exemptions from VAT must, as was stated in paragraph 15 of this judgment, be interpreted strictly.

21 The operations of fuelling and provisioning of vessels mentioned in Article 15(4) of the Sixth Directive are exempted because they are treated as exports (see, to that effect, *Velker International Oil Company*, paragraph 21).

22 In the case of export transactions, just as the automatic exemption laid down in Article 15(1) of the Sixth Directive applies exclusively to the final supply of goods dispatched or transported outside the Community by the seller, or on his behalf, the exemption laid down in Article 15(4) can only apply to the supply of goods to a vessel operator who will use those goods for provisioning and it cannot therefore be extended to the supply of goods effected at an earlier stage in the commercial chain (see, to that effect, *Velker International Oil Company*, paragraph 22).

23 Extending the exemption to stages prior to the final supply of the goods to the vessel operator would require Member States to set up means of supervision and monitoring in order to be sure of the ultimate use of the goods supplied free of tax. Such means would give rise to constraints for the Member States and the economic agents concerned which would be irreconcilable with the 'correct and straightforward application of such exemptions' prescribed by the first sentence of Article 15 of the Sixth Directive (see, to that effect, *Velker International Oil Company*, paragraph 24).

24 As Advocate General Stix-Hackl states at point 28 of her Opinion, the same considerations apply to the exemption for the supply of services under Article 15(8). It follows that, in order to guarantee a coherent application of the Sixth Directive as a whole, the exemption provided for under this provision applies only to services supplied directly to the shipowner, and cannot therefore be extended to services supplied at an earlier stage in the commercial chain.

25 The answer to the second question must therefore be that Article 15(8) of the Sixth Directive is to be interpreted as meaning that the exemption provided for therein applies to the supply of services directly to the shipowner for the direct needs of sea-going vessels.

The third question

26 In its third question, the referring court asks in essence whether, under the rules and principles of Community law on VAT, conduct of the national tax authority authorising a taxable person not to pass on the VAT to the other party to a contract can, even if that conduct is unlawful, give rise to a legitimate expectation on the part of the taxable person that would preclude subsequent payment of the tax.

27 According to the Commission, the principle of protection of legitimate expectations does not permit subsequent payment of VAT that the taxable person did not pass on to the other party to a contract during the tax years in question, and which he did not pay to the tax authority, to be required where the conduct of the latter over a number of years has reasonably led that taxable person to believe that he was not

obliged to pass on that tax. At the hearing, however, the Commission added that the fact that the information had not been communicated by the competent tax authority might lead to a different conclusion.

28 By contrast, the Greek Government takes the view that the rules of Community law on VAT do not preclude the subsequent collection of a tax which was not paid to the tax authority because the taxable person believed that he was not obliged to pass on that tax, where that belief is due to an interpretation of the relevant legal provisions given, at the request of the taxable person, by an organ of the tax authority and, in particular, where that organ was not competent to answer such requests.

29 According to the Italian Government, balancing the principles of legal certainty and protection of legitimate expectations on the one hand, and the need to comply with Community VAT rules on the other, should lead one to conclude that, in the main proceedings, the Greek State should not impose any penalty or even require payment of interest, but that the tax itself should be paid.

30 It is apparent from the orders for reference that the interim decisions of the competent tax authority of 5 June 1997, requiring payment of VAT due for the tax years 1994 (Case C-183/04), 1995 (Case C-182/04) and 1996 (Case C-181/04), and effectively withdrawing an exemption from the said tax previously granted by the Piraeus tax authority, are in issue.

31 Under the settled case-law of the Court, the principles of protection of legitimate expectations and legal certainty form part of the Community legal order. On that basis, these principles must be respected by the institutions of the Community, but also by Member States in the exercise of the powers conferred on them by Community directives (see in particular Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraph 26, and Case C-376/02 *'Goed Wonen'* [2005] ECR I-3445, paragraph 32). It follows that national authorities are obliged to respect the principle of protection of the legitimate expectations of economic agents.

32 As regards the principle of protection of the legitimate expectations of the beneficiary of the favourable conduct, it is appropriate, first, to determine whether the conduct of the administrative authorities gave rise to a reasonable expectation in the mind of a reasonably prudent economic agent (see, to that effect, Joined Cases 95/74 to 98/74, 15/75 and 100/75 *Union nationale des coopératives agricoles de céréales and Others* v *Commission and Council* [1975] ECR 1615, paragraphs 43 to 45, and Case 78/77 *Lührs* [1978] ECR 169, paragraph 6). If it did, the legitimate nature of this expectation must then be established.

33 In the present case, as set out in the orders for reference, Elmeka asked the Piraeus tax authority whether, in the context of the provisioning of vessels, it was exempt from VAT under Article 22 of Law No 1642/1986, and, if so, under what procedure. The authority replied that the bills of lading were exempt from VAT in accordance with Article 22(c) and (d) of the Law.

34 It should also be noted that the Greek Government has made clear, both in its written observations and at the hearing, that there is an express provision of national

law designating the competent national authority for answering questions asked by members of the public on legal issues related to taxation.

35 In that respect, it falls to the national court to decide whether Elmeka, which operates a tanker to carry petroleum products within Greece on behalf of various charterers, could reasonably have believed that the tax authority of Piraeus was competent to rule on the application of the exemption to its activities.

36 In the light of those observations the answer to the third question must be that in the framework of the common system of VAT, national tax authorities are obliged to respect the principle of protection of legitimate expectations. It falls to the referring court to decide whether, in the circumstances of the main proceedings, the taxable person could reasonably have believed that the decision in question had been taken by a competent authority.

Costs

37 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 of Justice, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 15(4)(a) 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, to which Article 15(5) of that directive refers, as amended by Council Directive 92/111/EEC of 14 December 1992, applies not only to vessels used on the high seas for the carriage of passengers for reward, but also to vessels used on the high seas for the purpose of commercial, industrial or fishing activity.**

2. **Article 15(8) of the Sixth Directive (77/388) is to be interpreted as meaning that the exemption provided for therein applies to the supply of services directly to the shipowner for the direct needs of sea-going vessels.**

3. **In the framework of the common system of value added tax, national tax authorities are obliged to respect the principle of protection of legitimate expectations. It falls to the referring court to decide whether, in the circumstances of the main proceedings, the taxable person could reasonably have believed that the decision in question had been taken by a competent authority.**

[Signatures]