JUDGMENT OF THE COURT (Third Chamber)

3 June 2010 *

In Case C-237/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (Belgium), made by decision of 18 June 2009, received at the Court on 1 July 2009, in the proceedings

État belge

v

Nathalie De Fruytier,

* Language of the case: French.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský (Rapporteur) and D. Šváby, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ms De Fruytier, by E. Traversa, avocat,

— the Belgian Government, by M. Jacobs, acting as Agent,

— the Greek Government, by K. Georgiadis, I. Bakopoulos and M. Tassopoulou, acting as Agents,

— the Commission of the European Communities, by M. Afonso, 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 Article 13(A)(1)(d) 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 the course of proceedings between Ms De Fruytier and the Belgian State concerning liability to value added tax ('VAT') in respect of the former's activity of transporting, in a self-employed capacity, human organs and samples for various hospitals and laboratories.

Legal context

European Union law

3 Article 5(1) of the Sixth Directive defines 'supply of goods' as the transfer of the right to dispose of tangible property as owner.

4 Article 6(1) of the Sixth Directive defines 'supply of services' as any transaction which does not constitute a supply of goods within the meaning of Article 5 of that directive.

5 Article 13(A)(1) of the Sixth Directive provides:

'... 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 possible evasion, avoidance or abuse:

...

(d) supplies of human organs, blood and milk;

...'

National law

6 Articles 10 and 18 of the Code de la taxe sur la valeur ajoutée (Belgian Value Added Tax Code) ('the VAT Code') transpose the definitions of supply of goods and supply of services given in Articles 5(1) and 6(1), respectively, of the Sixth Directive.

7 Article 10 of the VAT Code provides:

'1. "Supply of goods" means the transfer of the right to dispose of tangible property as owner. In particular, this involves making goods available to a person acquiring them pursuant to a contract transferring or dividing up ownership.

...'

8 Article 18 of the VAT Code provides:

'1. "Supply of services" means any transaction which does not constitute a supply of goods within the meaning of this code.

...'

9 Article 44 of the VAT Code, which transposes Article 13(A) of the Sixth Directive concerning exemption from VAT for certain activities in the public interest, provides:

'1. Services supplied in the course of their normal activity by the following persons shall be exempt from tax:

...

(2) doctors, dentists, physiotherapists, midwives, nurses, carers, home nurses and masseurs, whose medical care services are listed in the nomenclature of health services covered by compulsory sickness and invalidity insurance;

2. The following shall also be exempt from tax:

(1) the supply of services, and the supply of goods closely related thereto, provided in the course of their normal activity by hospitals and psychiatric institutions, clinics and medical centres; the transport of sick and injured persons in specially-equipped vehicles;

...

(l)(b) the supply of human organs, blood and milk;

...'

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

10 Ms De Fruytier is engaged, in a self-employed capacity, in transporting human organs and samples for various hospitals and laboratories.

11 The Belgian tax authority decided that Ms De Fruytier's activity was subject to VAT.

12 Considering that her activity should be exempt from VAT, Ms De Fruytier challenged that decision before the courts. The Court of First Instance, Namur, by judgment of 1 June 2006, and subsequently the Court of Appeal, Liège, by judgment of 26 October 2007, ruled in favour of Ms De Fruytier and ordered the relevant abatements.

13 In its judgment, the Court of Appeal, Liège held that the activity of transporting human organs and samples in which Ms De Fruytier engaged was exempt under Article 44(2)(1)(b) of the VAT Code, essentially on the following grounds.

14 Trading in human organs and samples is prohibited under Belgian law. Therefore, in order to ensure the effectiveness of Article 44(2)(1)(b) of the VAT Code, the activity

in the public interest covered by those provisions with regard to human organs, blood and milk cannot be the supply of such items in the sense of a 'supply of goods', as defined in Article 10 of the VAT Code, because such 'supply' is, by definition, excluded as it is prohibited by law. The 'supply' for the purposes of Article 44(2)(1)(b) of the VAT Code must therefore be regarded as being related to the act of actually supplying goods, which is what the transport services provided by Ms De Fruytier correspond to.

15 The Belgian State appealed against that judgment on a point of law.

16 In support of its appeal, it argues that the term 'supply' used in Article 44(2)(1)(b) of the VAT Code should be interpreted according to the definition given in Article 10 of the VAT Code, that is to say, any transaction whereby tangible property is transferred by one party to another party, who is thenceforth authorised to dispose of it as owner or in the capacity of owner. Consequently, since the transport activity engaged in by Ms De Fruytier should be regarded not as a 'supply of goods' within the meaning of Article 10 of the VAT Code, but as a supply of services, it is not covered by the exemption contained in Article 44(2)(1)(b) of the VAT Code.

17 In those circumstances the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the activity of transporting, in a self-employed capacity, human organs and samples for hospitals and laboratories constitute the supply of human organs, blood and milk, which is exempt from [VAT] under Article 13(A)(1)(d) of the Sixth Directive …?'

The question referred for a preliminary ruling

18 By its question, the referring court asks, in essence, whether Article 13(A)(1)(d) of the Sixth Directive, since it exempts from VAT 'supplies of human organs, blood and milk', must be interpreted as applying to the activity of transporting, on a self-employed basis, human organs and samples, for hospitals and laboratories.

19 It must be recalled at the outset that the Sixth Directive confers a very wide scope of application on VAT, covering all economic activities of producers, traders and persons supplying services. However, Article 13 of that directive exempts from VAT certain activities of public interest (Article 13(A)) and other activities (Article 13(B)) (see Case C-253/07 *Canterbury Hockey Club and Canterbury Ladies Hockey Club* [2008] ECR I-7821, paragraph 15, and Case C-473/08 *Eulitz* [2010] ECR I-907, point 24).

20 Also, according to consistent case-law, the terms used to specify an exemption contained in Article 13 of the Sixth Directive are to be interpreted strictly, since that exemption constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see Case C-434/05 *Horizon College* [2007] ECR I-4793, paragraph 16; Case C-445/05 *Haderer* [2007] ECR I-4841, paragraph 18 and case-law cited; and Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 25 and case-law cited).

21 According to the case-law of the Court, the exemptions provided for in Article 13 of the Sixth Directive constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (see, in particular, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15; *Horizon College*, paragraph 15; and Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10099, paragraph 33). As a consequence, the terms of a provision of the Sixth Directive which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union (see to that effect Case C-497/01 *Zita Modes* [2003] ECR I-14393, paragraph 34, and Case C-25/03 *HE* [2005] ECR I-3123, paragraph 63).

22 It follows from the foregoing that the 'supply of goods', to which Article 13(A)(1)(d) of the Sixth Directive refers in connection with 'supplies of human organs, blood and milk', must be given an autonomous and uniform interpretation specific to the law of the European Union.

23 In that regard, it must be recalled that Article 5(1) of the Sixth Directive provides that '"supply of goods" shall mean the transfer of the right to dispose of tangible property as owner' (see Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 31). Also, it is clear from Article 6(1) of the Sixth Directive that the term 'supply of services' covers any transaction not constituting a supply of goods within the meaning of Article 5 of that directive (see Case C-88/09 *Graphic Procédé* [2010] ECR I-1049, paragraph 17).

24 Moreover, it follows from the case-law of the Court that the concept of supply of goods does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner (see, to that effect, Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraphs 7 and 8; Case C-291/92 *Armbrecht* [1995] ECR I-2775,

paragraphs 13 and 14; Case C-185/01 *Auto Lease Holland* [2003] ECR I-1317, paragraphs 32 and 33; and *Aktiebolaget NN*, paragraph 32 and case-law cited).

25 If an activity of transporting human organs and samples, such as that at issue in the main proceedings, merely involves physically moving the goods concerned from one place to another for various hospitals and laboratories, such activity cannot equate to a 'supply of goods' within the meaning of Article 5(1) of the Sixth Directive since it does not enable the other party actually to dispose of the goods at issue as if he were the owner.

26 Consequently, such an activity cannot benefit from the exemption from VAT under Article 13(A)(1)(d) of the Sixth Directive for 'supplies of human organs, blood and milk'.

27 In that regard, even though it is clear from the order for reference that in Belgium human organs and samples cannot be traded, and even though Article 21 of the Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, concluded at Oviedo on 4 April 1997, provides, under the heading 'Prohibition of financial gain', that the human body and its parts are not, as such, to give rise to financial gain, those factors in themselves cannot be regarded as wholly depriving Article 13(A)(1)(d) of the Sixth Directive of its effectiveness. That convention, open for signature in particular by the member States of the Council of Europe, on the one hand, and by the European Union, on the other hand, under Article 33(1) of the convention, has not been signed by the European Union. Moreover, of the Member States, only a small majority of them have actually ratified the convention.

28 It is conceivable therefore that in Member States other than the Kingdom of Belgium

such transactions, in particular those relating to human milk, are lawful and may thus enjoy the exemption provided for in Article 13(A)(1)(d) of the Sixth Directive.

29 In the light of the above considerations, the answer to the question referred must be that Article 13(A)(1)(d) of the Sixth Directive, exempting 'supplies of human organs, blood and milk' from VAT, must be interpreted as not applying to the activity of transporting, in a self-employed capacity, human organs and samples for hospitals and laboratories.

Costs

30 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 (Third Chamber) hereby rules:

Article 13(A)(1)(d) 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, exempting 'supplies of human organs, blood and milk' from value added tax, must be interpreted as not applying to the activity of transporting, in a self-employed capacity, human organs and samples for hospitals and laboratories.

[Signatures]