JUDGMENT OF THE COURT (Fifth Chamber)
27 November 2003 *

In Case C-497/01,

REFERENCE to the Court under Article 234 EC by the Tribunal d'arrondissement de Luxembourg (Luxembourg) for a preliminary ruling in the proceedings pending before that court between

Zita Modes Sàrl

and

Administration de l'enregistrement et des domaines,

on the interpretation of Article 5(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 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain

* Language of the case: French.

exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18),

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, D.A.O. Edward and S. von Bahr (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Administration de l'enregistrement et des domaines, by F. Kremer, avocat,

— the Commission of the European Communities, by E. Traversa and C. Giolito, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1 By judgment of 19 December 2001, received at the Court on 24 December 2001, the Tribunal d'arrondissement (District Court), Luxembourg, referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 5(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 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18) ('the Sixth Directive').

2 These questions have been raised in proceedings between Zita Modes Sàrl ('Zita Modes') and the Administration de l'enregistrement et des domaines concerning the application of value added tax ('VAT') to the sale of a ready-to-wear clothing business.

Relevant provisions

Community legislation

3 Under Article 2(1) of the Sixth Directive, VAT is chargeable on the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such.

4 Under Article 5(1) of the Sixth Directive, 'supply of goods' shall mean the transfer of the right to dispose of tangible property as owner.

5 Under Article 5(8) of the Sixth Directive:

'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.'

6 Article 17(2)(a) of the Sixth Directive provides:

'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;

...'.

National legislation

7 Under Article 9(1) of the Luxembourg Law of 5 August 1969 on valued added tax, as amended and supplemented by the Law of 12 February 1979 (Mém. A 1979, p. 453, 'the VAT Law'), 'supply of goods' means the transfer of the right to dispose of tangible property as owner.

8 The first paragraph of Article 9(2) of the VAT Law provides:

'By way of derogation from the provisions of paragraph (1), the transfer, in whatever form and on whatever basis, of a totality of assets or part thereof to another taxable person shall not be deemed a supply of goods. In such a case, the transferee shall be treated as the successor to the transferor'.

The main proceedings and the questions referred for a preliminary ruling

9 According to the judgment of the court making the reference, on 29 August 1996 Zita Modes sent to Milady, which operated a perfumery, an invoice concerning 'the sale of a ready-to-wear clothing business' for the sum of LUF 1 700 000. The invoice stated that, in accordance with the statutory provisions in force, it was not subject to the system of VAT.

10 By a tax statement notified on 25 June 1998, Diekirch Tax Office I (Luxembourg) of the Administration de l'enregistrement et des domaines automatically corrected the balance of VAT owed by Zita Modes for 1996, placing the following comment under the heading 'Observations': 'Adjustment of input tax deducted on B.I. taxation of the transfer of the business (Article 9(2) not applicable)'.

11 The Administration de l'enregistrement et des domaines maintained that Article 9(2) of the VAT Law was not applicable due to the absence of continuation of the transferor's activity, the latter operating a clothing business and the transferee a perfumery.

12 In its complaint of 1 July 1998, Zita Modes argued that that provision did not state that continuation by the transferee of the transferor's activity must be within the same branch. Moreover, since both parties involved were taxable persons, there would have been a full refund of the tax if the transfer had been subject to VAT.

13 On 25 August 1998, the Administration de l'enregistrement et des domaines rejected the complaint, stating in particular that Article 9(2) of the VAT Law

required the transferee to be a taxable person who continued the transferor's activity in the same branch. Moreover, the transferee must be legally entitled to operate in that branch, which was not the case here, as there was no specific authorisation for that purpose by the competent ministry.

14 Zita Modes made application to the Tribunal d'arrondissement de Luxembourg on 20 November 1998 for reversal of the Administration's decision and for a ruling that the transfer of its business to Milady was not subject to VAT.

15 The national court points out that it is established that Zita Modes made a transfer of assets to Milady at the price of LUF 1 700 000. On the other hand, the assets which were transferred have not been exactly identified.

16 In particular, the national judgment states that Zita Modes' claim that the transfer 'related to the "fashion accessories matching the articles of ready-made clothing" which formed part of the ready-to-wear clothing business sold, which comprises "articles of perfumery produced by [the] same firm [as that which manufactured the articles of ready-made clothing]" and which were used by Milady in continuation of the activity of... Zita Modes' has not been established.

17 According to the national court, it must be decided in the main proceedings whether the transfer of a totality of assets to a taxable person, whatever his activity, constitutes a sufficient condition for the application of the rule laid down in Article 5(8) of the Sixth Directive, according to which, for the purposes of VAT, no supply of goods has taken place at the time of such a transfer (the 'no-supply rule'), or whether the transfer must be made with the intention of continuing the transferor's activity.

18 It also needs to be established whether the provision allows a distinction to be made between transfer of a totality of assets to a taxable person who pursues the transferor's activity in accordance with the authorisation to pursue the activity laid down in the Member State concerned and transfer to a taxable person who does not hold the required authorisation.

19 In those circumstances the Tribunal d'arrondissement de Luxembourg decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is Article 5(8) of the Sixth Directive... to be interpreted as meaning that the transfer of a totality of assets to a taxable person constitutes a sufficient condition for the transaction not to be made subject to value added tax, whatever the taxable person's activity may be or whatever use he makes of the goods transferred?

2. If the answer to the first question is in the negative, is Article 5(8) of the Sixth Directive to be interpreted as meaning that the transfer of a totality of assets to a taxable person is to be understood as meaning a transfer of all or part of an undertaking to a taxable person who continues the whole activity of the transferor undertaking or continues the activity of the branch corresponding to the part of the totality of assets transferred, or merely as meaning a transfer of a totality of assets or part thereof to a taxable person who continues the transferor's line of activity in whole or in part, without there being any transfer of an undertaking or branch of an undertaking?

3. If the answer to any part of the second question is in the affirmative, does Article 5(8) of the Sixth Directive require or allow a State to require that the transferee's activity be pursued in accordance with the authorisation issued

by the competent authority to pursue the activity or branch of activity stipulated, assuming that the activity pursued falls within lawful economic channels in the sense contemplated in the case-law of the Court of Justice?'

The first and second questions

20 In the first and second questions, which should be considered together, the national court asks essentially if Article 5(8) of the Sixth Directive must be interpreted as meaning that, when a Member State has made use of the option in the first sentence of the paragraph to consider that for the purposes of VAT no supply of goods has taken place in the event of a transfer of a totality of assets, that no-supply rule applies to any transfer of a totality of assets or only to those in which the transferee pursues the same type of economic activity as the transferor.

Observations submitted to the Court

21 The Administration de l'enregistrement et des domaines submits that Article 9(2) of the VAT Law helps to ensure observance of the principle of VAT neutrality, since the transferee assumes the rights and obligations of the transferor in relation to VAT, in particular those concerning the possible adjustments of deductions for capital goods.

22 The condition that the transferee continue the activity of the transferor is implicit in both Article 5(8) of the Sixth Directive and Article 9(2) of the VAT Law.

23 If the transferee is to be deemed the successor of the transferor, he must continue the activity pursued by the transferor before him.

24 The Commission of the European Communities points out, in general terms, relying in particular on paragraphs 24 and 35 of Case C-408/98 *Abbey National* [2001] ECR I-1361, that Article 5(8) of the Sixth Directive pursues the sole aim of administrative simplification and protection of the resources of taxable persons. Fiscally, in accordance with the principle of neutrality, the application of this provision should lead to exactly the same result whether the VAT is charged by the transferor and then deducted by the transferee or whether the transaction is not taxed.

25 Moreover, the second sentence of Article 5(8) of the Sixth Directive is intended to make clear that, if the transfer of a totality of assets is made in favour of a taxable person who does not have a full right of deduction, the effect of not taxing the transaction is that a person partially liable to tax does not have to bear part of the non-deductible VAT, whereas he would have to bear such a charge if the transaction had been taxed in the normal way.

26 Concerning transfer of a totality of assets, a concept of Community law which falls to be interpreted by the Court, the Commission argues that the national court must establish whether the transferred assets constitute a 'totality of assets or part thereof' within the meaning of the Sixth Directive, that is, assets capable of being exploited in the context of an economic activity (see paragraphs 27 and 28 of the Opinion of Advocate General Jacobs in the *Abbey National* case, cited above).

27 In this respect the mere sale, in isolation, of fashion accessories does not constitute a transfer of a totality of assets within the meaning of the Sixth Directive, but an ordinary supply of items of stock of an undertaking. On the other hand, the transfer of a coherent body of assets capable of allowing the pursuit of an economic activity within the meaning of the Sixth Directive could fall within the scope of Article 5(8) of that directive.

28 In respect of the use made by the transferee of the totality of assets transferred, the Commission believes that an interpretation requiring that the activity pursued by the latter be exactly the same as that pursued by the transferor is too restrictive. Article 17(2) of the Sixth Directive specifies that the right to deduct may only be exercised in so far as the goods and services are used for the purposes of the taxable person's taxable transactions. The principle of VAT neutrality requires therefore that the totality of assets transferred to the taxable person be used for the purposes of his taxable transactions.

Findings of the Court

29 The first sentence of Article 5(8) of the Sixth Directive provides that Member States may, in the event of a transfer of a totality of assets or part thereof, consider that no supply of goods has taken place and that the recipient is the successor to the transferor. It follows that when a Member State has made use of that option the transfer of a totality of assets or part thereof is not regarded as a supply of goods for the purposes of the Sixth Directive. Under Article 2 of that directive, such a transfer is thus not subject to VAT (see *Abbey National*, cited above, paragraph 30).

30 Under the second sentence of Article 5(8) of the Sixth Directive the Member States may exclude from the application of the no-supply rule transfers of a totality of assets in favour of a transferee who is not a taxable person within the meaning of that directive or who acts as a taxable person only in relation to part of his activities, if this is necessary to prevent distortion of competition. This provision should be regarded as exhaustive in relation to the conditions under which a Member State which makes use of the option laid down in the first sentence of this paragraph may limit the application of the no-supply rule.

31 It follows that a Member State which makes use of the option granted in the first sentence of Article 5(8) of the Sixth Directive must apply the no-supply rule to any transfer of a totality of assets or part thereof and may not therefore restrict the application of the rule to certain transfers only, save under the conditions laid down in the second sentence of the same paragraph.

32 This interpretation is consistent with the purpose of the Sixth Directive, which is to determine the basis of VAT in a uniform manner according to Community rules (see Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 48). Like all the exemptions provided for in Article 13 of the Sixth Directive, the no-supply rule laid down in Article 5(8) constitutes an independent concept of Community law whose purpose is to prevent divergences in the application of the VAT system from one Member State to another (see, in relation to exemptions, Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 11, and Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 44).

33 As to the assets transferred and the use made of those assets by the transferee after the transfer, firstly, the Sixth Directive does not include any definition of 'a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof'.

34 However, according to settled case-law, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law 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 Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (see, in particular, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26, and Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 35).

35 It is undisputed that Article 5(8) of the Sixth Directive makes no express reference to the law of the Member States for the purpose of determining the meaning and scope of the concept of a transfer of a totality of assets or part thereof.

36 In relation to the context of Article 5(8) of the Sixth Directive, the provisions of that article specify what constitutes a supply of goods within the meaning of the directive. Article 5(1) states that the transfer of the right to dispose of tangible property as owner is to be regarded as a supply of goods. Article 5(2) to (7) define, for the purposes of the Sixth Directive, what may or must be regarded by the Member States as tangible property, supplies and supplies made for consideration.

37 As for the purpose of the Sixth Directive, it should be borne in mind that, on the one hand, according to the fundamental principle which underlies the common VAT system and which follows from Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14), and from the Sixth Directive, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 29, and *Abbey National*, cited above, paragraph 27).

38 On the other hand, the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, to that effect, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case C-37/95 *Belgian State* v *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 44; *Midland Bank*, cited above, paragraph 19, and *Abbey National,* cited above, paragraph 24).

39 The context of Article 5(8) and the purpose of the Sixth Directive, as set out in paragraphs 36 to 38 of this judgment, make it clear that that provision is intended to enable the Member States to facilitate transfers of undertakings or parts of undertakings by simplifying them and preventing overburdening the resources of the transferee with a disproportionate charge to tax which would in any event ultimately be recovered by deduction of the input VAT paid.

40 Having regard to this purpose, the concept of 'a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof' must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products.

41 As the Advocate General correctly noted at paragraph 39 of his Opinion, special treatment is justified in these circumstances in particular because the amount of VAT to be advanced on the transfer is likely to be particularly large in relation to the resources of the business concerned.

42 Secondly, concerning the use which is to be made by the transferee of the totality of assets transferred, clearly Article 5(8) of the Sixth Directive does not contain any express requirement as to that use.

43 As regards the fact that Article 5(8) provides that the transferee is to be treated as the successor to the transferor, it follows from the wording of that paragraph, as the Commission correctly points out, that the succession does not constitute a condition for the application of the paragraph, but is merely a result of the fact that no supply is considered to have taken place.

44 However, it is apparent from the purpose of Article 5(8) of the Sixth Directive and from the interpretation of the concept of 'a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof' which flows from it, as set out in paragraph 40 of this judgment, that the transfers referred to in that provision are those in which the transferee intends to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.

45 On the other hand, nothing in Article 5(8) of the Sixth Directive requires that the transferee pursue prior to the transfer the same type of economic activity as the transferor.

46 The answer to the first and second questions must therefore be that Article 5(8) of the Sixth Directive must be interpreted as meaning that when a Member State has made use of the option in the first sentence of that paragraph to consider that for the purposes of VAT no supply of goods has taken place in the event of a transfer of a totality of assets, that no-supply rule applies — without prejudice to use of the possibility of restricting its application in the circumstances laid down in the second sentence of the same paragraph — to any transfer of a business or an independent part of an undertaking, including tangible elements and, as the case

may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity. The transferee must however intend to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.

The third question

Observations submitted to the Court

47 The Administration de l'enregistrement et des domaines argues that checking compliance with the conditions as regards pursuit of the activity by the transferee is a purely internal matter for the Member States.

48 As regards the legal authorisations required to pursue an activity, the Commission cites Case C-455/98 *Salumets and Others* [2000] ECR I-4993 to show that any pursuit of an activity by Milady without the required administrative authorisation would give rise to taxation under the principle of fiscal neutrality, since the products sold 'unlawfully' would appear to be in competition with the same products sold lawfully, and Case C-349/96 *CPP* [1999] ECR I-973 to show that a Member State may not restrict the scope of a VAT exemption to supplies by insurers who are authorised by national law to pursue insurance activities.

Findings of the Court

49 It must be noted at the outset that, as the Court stated in paragraph 31 of this judgment, a Member State which makes use of the option in the first sentence of Article 5(8) of the Sixth Directive must apply the no-supply rule which that provision lays down to any transfer of a totality of assets or part thereof and may not therefore restrict the application of that rule to certain transfers only, save under the conditions laid down in the second sentence of the same paragraph.

50 Moreover, as the Court has held in relation to exemption for insurance transactions (see *CPP*, cited above, paragraphs 35 and 36), a Member State may not restrict the scope of the no-supply rule laid down in Article 5(8) of the Sixth Directive to transactions carried out by traders who are authorised by national law to pursue the activity in question.

51 In addition, in accordance with the principle of fiscal neutrality, transactions which, although unlawful, do not relate to products whose marketing is prohibited by their very nature or because of their special characteristics and which may compete with lawful transactions are subject to the taxes normally payable under the Community rules (see, concerning ethyl alcohol imported as contraband from third countries into the customs territory of the Community, *Salumets*, cited above, paragraphs 19, 20 and 23).

52 Immaterial in this respect is the fact that the pursuit of economic activity is subject in the Member State concerned to a special system of business authorisation (see to that effect *Salumets*, paragraph 22).

53 It is clear that a trader pursuing an economic activity for which he does not hold a business authorisation may be in competition with traders who do hold the required authorisations.

54 Therefore on the one hand the transfer of a business or a part of an undertaking is generally subject to VAT even if the transferee does not hold the business authorisation required by the Member State concerned for the pursuit of the economic activity which that business or that part of the undertaking enables to be carried on. On the other hand, when a Member State makes use of the option in the first sentence of Article 5(8) of the Sixth Directive, that transfer may not be excluded from the application of the no-supply rule for the sole reason that the transferee does not hold such an authorisation.

55 In the light of the foregoing considerations, the answer to the third question must be that when a Member State has made use of the option in the first sentence of Article 5(8) of the Sixth Directive to consider that for the purposes of VAT no supply of goods has taken place in the event of a transfer of a totality of assets, the restriction by a Member State of the application of that no-supply rule to transfers of a totality of assets where the transferee holds the authorisation for the pursuit of the economic activity which that totality enables to be carried on infringes that provision.

Costs

56 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main

action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal d'arrondissement de Luxembourg by judgment of 19 December 2001, hereby rules:

1. Article 5(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, as amended by Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them, must be interpreted as meaning that when a Member State has made use of the option in the first sentence of that paragraph to consider that for the purposes of value added tax no supply of goods has taken place in the event of a transfer of a totality of assets, that no-supply rule

applies — without prejudice to use of the possibility of restricting its application in the circumstances laid down in the second sentence of the same paragraph — to any transfer of a business or an independent part of an undertaking, including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity. The transferee must however intend to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.

2. When a Member State has made use of the option in the first sentence of Article 5(8) of Sixth Directive 77/388, as amended by Directive 95/7, to consider that for the purposes of value added tax no supply of goods has taken place in the event of a transfer of a totality of assets, the restriction by a Member State of the application of that no-supply rule to transfers of a totality of assets where the transferee holds the authorisation for pursuit of the economic activity which that totality enables to be carried on infringes that provision.

Jann Edward von Bahr

Delivered in open court in Luxembourg on 27 November 2003.

R. Grass V. Skouris

Registrar President