JUDGMENT OF THE COURT (First Chamber)

15 September 2005 *

In Case C-58/04,

Reference for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 23 October 2003, received at the Court on 11 February 2004, in the proceedings

Antje Köhler

v

Finanzamt Düsseldorf-Nord,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, K. Schiemann (Rapporteur), E. Juhász and E. Levits, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 February 2005,

after considering the observations submitted on behalf of:

— Ms Köhler, by G. Sinfield, Solicitor, H.-W. Schneiders, Steuerberater, and C. Küppers, Rechtsanwalt,

— the German Government, by C.-D. Quassowski, L. Lumma and W.-D. Plessing, acting as Agents,

— the Greek Government, by V. Kyriazopoulos, S. Chala and I. Bakopoulos, acting as Agents,

— the Commission of the European Communities, by D. Triantafyllou and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 'stop in a third territory' within the meaning of Article 8(1)(c) 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 amending Directive 77/388 and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47) ('the Sixth Directive').

2 The reference was made in the course of proceedings between Ms Köhler and the Finanzamt (Tax Office) as to whether sales made by the person concerned in her boutique on a cruise ship were taxable.

Legal background

Community legislation

3 Article 8 of the Sixth Directive provides that:

'1. The place of supply of goods shall be deemed to be:

...

(b) in the case of goods not dispatched or transported: the place where the goods are when the supply takes place.

(c) in the case of goods supplied on board ships, aircraft or trains during the part of a transport of passengers effected in the Community: at the point of the departure of the transport of passengers.

For the purposes of applying this provision:

— "part of a transport of passengers effected in the Community" shall mean the part of the transport effected, without a stop in a third territory, between the point of departure and the point of arrival of the transport of passengers,

— "the point of departure of the transport of passengers" shall mean the first point of passenger embarkation foreseen within the Community, where relevant after a leg outside the Community,

— "the point of arrival of the transport of passengers" shall mean the last point of disembarkation of passengers foreseen within the Community of passengers who embarked in the Community, where relevant before a leg outside the Community.

...'.

National legislation

4 Pursuant to the first sentence of Paragraph 1(1) of the Umsatzsteuergesetz (German Law on value added tax) ('UStG'), supplies made by a trader within German territory for consideration in the course of his business are subject to turnover tax.

5 Paragraph 3(6) of the UStG states:

'A supply is deemed to be made at the place where the goods were situated at the time the right to dispose of them arose.'

6 Paragraph 3e(1) of the UStG provides:

'If goods, not intended for immediate consumption, are supplied on board a ship, an aircraft or a train during a transport of passengers within the Community, the point of departure in the Community of the relevant transport shall be treated as the place of supply.'

7 Paragraph 3e(2) of the UStG provides:

'A transport of passengers within the Community, within the meaning of subparagraph (1), shall be deemed to include a transport or part of a transport between the point of departure and point of arrival of the means of transport in the Community without any stop outside the Community. For the purposes of the first sentence, the point of departure shall mean the first point of passenger embarkation foreseen within the Community. For the purposes of the first sentence, the point of arrival shall mean the last point of passenger disembarkation foreseen within the Community. In the case of a return trip, the return leg shall be considered to be a separate transport.'

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

8 During 1994, Ms Köhler operated a boutique on a cruise ship which made voyages departing from Kiel, Bremerhaven or Travemünde (towns in Germany), travelling to ports outside the Community (Norway, Estonia, Russia and Morocco) and ending in Kiel, Bremerhaven or Genoa (Italy). Those trips could only be booked for the entire cruise; it was not possible to embark for the first time or disembark finally during the cruise. However, it was possible to disembark for short periods for stops of several hours or one day in order to make sightseeing trips.

9 The Finanzamt decided to treat sales made in Ms Köhler's shop as taxable transactions on the ground that the points of arrival and departure were situated within Community territory. Ms Köhler brought an appeal against that decision before the Finanzgericht, claiming that on account of stops made in a third territory the sales in question were not to be taxable in Germany.

10 The Finanzgericht dismissed her appeal. It held that the fact that the transport of passengers was interrupted between the points of departure and arrival by stops in a third territory did not imply that the transactions were made outside national territory. Furthermore, only those stops intended for the embarkation of new passengers or for final disembarkation should be regarded as 'stops' within the meaning of Paragraph 3 of the UStG.

11 Ms Köhler brought an appeal before the Bundesfinanzhof contesting that interpretation.

12 Taking the view that the interpretation of 'stop in a third territory' is determinative of the outcome of the dispute, the Bundesfinanzhof decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

'Are stops made by a ship in ports of non-member countries, at which passengers may disembark from the vessel only for a short period, for example for sightseeing purposes, but at which they may not begin or end their journey, "stops in a third territory" within the meaning of Article 8(1)(c) of [the Sixth Directive]'

The question referred for a preliminary ruling

Observations submitted to the Court

13 The German Government suggests that the answer to the question should be in the negative. It argues that 'stop' should not be interpreted in a literal and restrictive fashion as applying to an individual traveller who makes a short stop somewhere before continuing his journey.

14 A 'stop' implies that passengers may get on or off a means of transport in order to begin or end their journey. Classifying a halt, during which passengers may only leave the means of transport briefly, as a 'stop' would run counter to the meaning and purpose of the provision in question. If the definition of 'stop' put forward by the applicant were to be accepted, the attachment rule laid down in Article 8(1)(c) of the Sixth Directive and consequently the fiscal aim of that provision (taxation of on-board supplies during intra-Community transport on Community territory) could easily be evaded. It would be enough to choose the means of transport and the itinerary so as to allow stops on the territory of third countries during which the passengers could briefly leave the means of transport, without being able to end their journey definitively.

15 The applicant, the Commission of the European Communities and the Greek Government take the view that the question referred for a preliminary ruling should be answered in the affirmative.

16 The applicant asserts that a stop does not necessarily involve embarkation or disembarkation from the means of transport. If that were the intention of the Community legislature it would have explicitly used the words 'embarkation' or 'disembarkation' as it did in order to define the 'point of departure' and the 'point of arrival'. 'Stop' should be interpreted as meaning a pause, an interruption of a journey or a halt.

17 The Commission submits that the rule laid down in Article 8(1)(c) of the Sixth Directive cannot be applied if it conflicts with the law of a third country. The Commission takes the view that the effect of short stops in the territory of third countries is to break the continuity of the intra-Community character of the transport. Each time that the passengers are able to purchase goods which are normally taxed the jurisdiction of the Member State which is the point of departure of the transport of passengers should therefore be suspended, so as not to conflict with the right of a third country to impose tax within its territory.

18 The Greek Government argues that by making an intermediate stop in a third country or in a territory which, from a tax point of view, is not part of the Community, the ship travels to and returns from a third country. Accordingly, goods sold in shops on those vessels should enjoy the tax exemption applied to passengers from third countries. Such an approach presupposes that passengers are able to disembark, during the stop, in a third territory and purchase tax-free goods there on the ground that they export them, regardless of the length of their stay in that country and without any obligation to end the journey.

Reply of the Court

19 In the absence of a specific definition of 'stop' in the Sixth Directive, it is appropriate to find its interpretation in the scheme and purpose of Article 8(1)(c).

20 That article is among the provisions of the Sixth Directive devoted to the determination of the place of taxable transactions and lays down in Article 8(1)(b), in relation to supplies of goods, a general rule according to which, in the case of goods not dispatched or transported, the place of supply is deemed to be the place where the goods are when the supply takes place.

21 Article 8(1)(c) contains a derogation from this principle of territoriality. It provides that the place where the goods are supplied is deemed to be situated at the point of the departure of the transport of passengers in the case of goods supplied on board ships, aircraft or trains during the part of a transport of passengers effected in the Community.

22 Therefore, Article 8(1)(c) of the Sixth Directive seeks to determine in a uniform manner the place of taxation of supplies of goods made on board ships, aircraft or trains in the course of a journey starting and ending on Community territory and limits taxation, during the part of the transport of passengers effected within the Community, to the point of departure of the means of transport. The result is a simplified scheme of taxation which avoids, throughout the intra-Community journey, the successive application of the national VAT systems of the Member States through which the journey is made and, therefore, conflicts concerning tax jurisdiction between Member States.

23 Furthermore, it must be observed that Article 8(1)(c) of the Sixth Directive states explicitly that 'part of a transport of passengers effected in the Community' is to be regarded as the part of the transport effected, without a stop in a third territory, between the point of departure and the point of arrival of the transport of passengers.

24 By excluding in that manner the existence of 'part of a transport of passengers effected within the Community', in the case of a stop in a third territory, Article 8(1)(c) of the Sixth Directive thus aims to avoid the risks of conflicts of jurisdiction with the tax systems of third countries which would arise in the event of goods being supplied whilst an intra-Community journey was interrupted by a stop in a third territory.

25 In that connection, it must be recalled that, as regards the taxation of services on board ships, the Court has already acknowledged that the Sixth Directive does not prohibit Member States from extending the scope of their tax legislation beyond their territorial limits, so long as they do not encroach on the jurisdiction of other States (Case 283/84 *Trans Tirreno Express* [1986] ECR 231, and Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 18). Such considerations also apply in relation to taxation of supplies of goods.

26 In the light of the scheme and the purpose of Article 8(1)(c) of the Sixth Directive, it should therefore be held that any supply of goods effected on a ship during a stop in a third territory is deemed to be made outside the scope of the Sixth Directive, the tax treatment of the supply of goods falling, in that case, within the tax jurisdiction of the State in which the stop is made.

27 Having regard to all of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that stops made by a ship in ports of a third country during which passengers may leave the ship, even for a short period, are 'stops in a third territory' within the meaning of Article 8(1)(c) of the Sixth Directive.

Costs

28 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:

Stops made by a ship in the ports of a third country during which passengers may leave the ship, even for a short period, are 'stops in a third territory' within the meaning of Article 8(1)(c) 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 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax.

[Signatures]