JUDGMENT OF THE COURT (Seventh Chamber)

28 July 2011 *

In Case C-106/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 27 January 2010, received at the Court on 25 February 2010, in the proceedings

Lidl & Companhia

v

Fazenda Pública,

intervener:

Ministério Público,

THE COURT (Seventh Chamber),

composed of D. Šváby (Rapporteur), President of the Chamber, G. Arestis and J. Malenovský, Judges,

* Language of the case: Portuguese.

Advocate General: V. Trstenjak,
Registrar: A. Impellizzeri, administrator,

having regard to the written procedure and further to the hearing on 5 May 2011,

after considering the observations submitted on behalf of:

— Lidl & Companhia, by M. Lourenço and I. Ramos, advogados,

— the Fazenda Pública, by N. Severino, advogado,

— the Portuguese Government, by L. Fernandes and R. Laires, acting as Agents,

— the European Commission, 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 The reference for a preliminary ruling concerns the interpretation of point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (JO 2006 L 347, p. 1, and corrigendum OJ 2007 L 335, p. 60) ('the Directive').

2 The reference has been made in proceedings between Lidl & Companhia and the Fazenda Pública (the Portuguese Treasury) concerning the inclusion in the taxable amount for value added tax ('VAT') of the vehicle tax (imposto sobre veículos, 'ISV') relating to the purchase of two vehicles from a Portuguese motor-vehicle importing company.

Legal context

European Union legislation

3 Article 73 of Directive 2006/112 provides:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

4 Point (a) of the first paragraph of Article 78 of that directive states:

'The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself.'

5 Article 79 of the Directive provides:

‘The taxable amount shall not include the following factors:

…

(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged.’

6 Article 83 of the Directive provides:

‘In respect of the intra-Community acquisition of goods, the taxable amount shall be established on the basis of the same factors as are used in accordance with Chapter 1 to determine the taxable amount for the supply of the same goods within the territory of the Member State concerned …’

National legislation

The VAT legislation

7 Article 16 of the VAT Code (Código do Imposto sobre o Valor Acrescentado, 'the CIVA') provides:

'1. Without prejudice to paragraph 2, the taxable amount in respect of the taxable supply of goods or services shall be equivalent to the value of the consideration received or to be received from the purchaser, the recipient of services or a third party.

...

5. The taxable amount in respect of the taxable supply of goods or services shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

...

6. The taxable amount shall not include the following factors:

...

(c) amounts paid in the name and on behalf of the purchaser of the goods or of the recipient of the services, duly recorded in a third party account by the taxpayer:

...'

8 Article 17 of the CIVA states:

'1. The taxable amount of imported goods shall be their value for customs purposes, determined in accordance with the European Union provisions in force.

2. The taxable amount shall include the following factors, in so far as they are not already included:

(a) taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied:

...'

9 Article 17 of the VAT Rules applicable to intra-Community transactions (Regime do IVA nas Transacções Intracomunitárias) is worded as follows:

'1. For the purposes of determining the taxable amount for intra-Community purchases of goods, the provisions of Article 16 of the CIVA relating to the supply of goods shall apply on the same conditions.

...

3. In the case of intra-Community purchases of goods subject to excise duties or vehicle tax, those duties or taxes shall be included in the taxable amount, even if they are not charged at the same time.'

The vehicle tax rules

10 The vehicle tax code (Código do ISV), published as an annex to Law No 22-A/2007 of 29 June 2007 (*Diário da República* I, No 124, of 29 June 2007, 'the CISV') entered into force on 1 July 2007.

11 Article 3(1) of the CISV provides:

'The tax shall be payable by registered operators [licensed dealers], authorised operators and private individuals, as defined in this Code, engaged in the release for consumption of vehicles liable to the tax, such persons being considered to be those persons in whose name the customs declaration for vehicles or the supplementary declaration for vehicles is made.'

12 Article 5 of the CISV reads as follows:

'1. The chargeable event for the tax shall be the manufacture or assembly in, or admission or import into, national territory of vehicles liable to tax that must be registered in Portugal.

2. The following also shall be a chargeable event for the tax:

(a) the allocation of a new, definitive registration number following voluntary national deregistration, together with reimbursement of the tax or any other tax advantage;

...

(d) the presence of the vehicle in national territory in breach of the provisions of this Code.

3. For the purposes of this Code, the following definitions shall apply:

(a) "admission" means the entry into national territory of a vehicle originating or released for free circulation in another Member State of the European Union;

(b) "import" means the entry into national territory of a vehicle originating in a non-member country.

...'

13 In accordance with Article 6(1) of the CISV, ISV becomes payable at the moment of release for consumption, that is to say:

'(a) at the time when the application for release for consumption is made by registered operators and authorised operators;

(b) at the time when the customs declaration for vehicles or the supplementary declaration for vehicles is made by private individuals.'

14 Article 16 of the CISV defines private individuals as 'any taxable persons carrying out the admission or import of vehicles liable to tax, whether new or second-hand, for the principal purpose of satisfying their own transport needs.'

15 In accordance with Article 27(3) of the CISV, the authorities responsible for registration may not consent to register vehicles unless proof is supplied of payment, in particular of ISV when that tax is payable.

16 Pursuant to Article 58(1) of the CISV entitled 'Transfer of residence', vehicles belonging to persons moving their residence to Portugal from another Member State of the Union or from a non-member State are exempt from payment of ISV.

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

17 On 28 September 2007, Lidl & Companhia bought two motor vehicles. The invoices issued by the supplier and paid by that undertaking included the basic price, the ISV and miscellaneous expenses. VAT was applied to the total amount at the rate of 21 %.

18 On 25 January 2008, Lidl & Companhia brought an administrative appeal against the notice of assessment of liability for the VAT charged on the two abovementioned invoices, the amounts of VAT assessed coming to EUR 8 601.23 and EUR 4 554.33, respectively. On 7 April 2008, the director of the Sintra Region 1 tax office rejected that appeal, by order of which the appellant was notified.

19 The Tribunal Administrativo e Fiscal de Sintra having dismissed in its entirety the action brought by Lidl & Companhia against the notice of assessment to VAT, that undertaking appealed to the Supremo Tribunal Administrativo. Before this court, the appellant maintains that the decision of the Tribunal Administrativo e Fiscal de Sintra, in accepting the argument that the ISV charged and paid on the import of vehicles into national territory must be included in the calculation of the taxable amount for VAT, infringes Article 16(6)(c) of the CISV and point (c) of the first paragraph of Article 79 of Directive 2006/112. Lidl & Companhia argues that, although it is not the taxable person in respect of the ISV imposed on the vehicles it purchased, that tax was passed on to it and gave rise to the payment of an excessive amount of VAT, of which it claims repayment.

20 The Ministério Público (State Counsel's office) for the national court takes the view that ISV is a 'single-stage' tax, payable once only, when, on its first registration in Portugal, the vehicle is first brought onto the Portuguese market. It has argued that this tax, the chargeable event for which is the bringing of the vehicle onto the Portuguese market on its first registration in Portugal, possesses features similar to those of the registration duty giving rise to the judgment in Case C-98/05 *De Danske Bilimportører* [2006] ECR I-4945. In consequence, it suggests that a reference should be made to the Court of Justice seeking a preliminary ruling.

21 Having regard to the claims made by the appellant and by the Ministério Público, but considering none the less that to include ISV within the taxable amount for VAT does not infringe European Union law, the Supremo Tribunal Administrativo has decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is point (a) of the first paragraph of Article 78, read in conjunction with point (c) of the first paragraph of Article 79, of Directive 2006/112/EC of 28 November 2006 to be interpreted as prohibiting, in the case of intra-Community purchases, the inclusion in the taxable amount for VAT of the vehicle tax introduced by Law No 22-A/2007 of 29 June 2007?'

The question referred for a preliminary ruling

Admissibility

22 In its observations, the Portuguese Government challenges the admissibility of this reference for a preliminary ruling.

23 In particular, it argues that the order for reference does not give sufficient information, first, as to the nature of the operation at issue in the main proceedings, whether supply of goods or intra-Community purchase, next, as to the manner in which Lidl & Companhia paid the ISV and the disputed VAT and, last, as to the link between the dispute in the main proceedings and the provisions of which interpretation is sought.

24 In this regard it is to be borne in mind that, in accordance with settled case-law, in proceedings under Article 267 TFEU, based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* [2011] ECR I-4599, paragraph 47 and case-law cited).

25 It follows that questions referred for a preliminary ruling concerning European Union law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-225/09 *Jakubowska* [2011] ECR I-12329, paragraph 28 and case-law cited).

26 It must be stated that the order for reference contains an adequate description of the legal and factual background to the dispute in the main proceedings, and that the information provided by the referring court makes it possible for the significance of the questions referred to be determined. Moreover, it is not for the Court of Justice to call in question either the classification as an intra-Community purchase of the transaction at issue in the main proceedings, made by the national court in the question it has referred, or the implied view that the appellant in the main proceedings paid VAT on the sum of the ISV and that it seeks repayment thereof. Having regard to the reference made in Article 83 of Directive 2006/112 to Article 73 et seq. of the latter, interpretation of Articles 78 and 79 of the Directive is, on any view, relevant to the settlement of the case in the main proceedings, whether the transaction at issue in those proceedings is a supply of goods or an intra-Community acquisition.

27 It follows that the reference for a preliminary ruling is admissible.

Substance

28 By its question, the national court seeks, in essence, to ascertain whether a tax such as ISV must be included in the taxable amount for VAT as a tax, duty, levy or charge within the meaning of point (a) of the first paragraph of Article 78 of Directive

2006/112 or must, on the contrary, be left out of that taxable amount pursuant to point (c) of the first paragraph of Article 79 of the Directive.

29 The first point to be noted here is that, according to Article 83 of Directive 2006/112, in respect of the intra-Community acquisition of goods, the taxable amount is to be established on the basis of the same factors as are used, in accordance with Articles 73 to 82 of the Directive, to determine the taxable amount for the supply of the same goods within the territory of the Member State concerned.

30 Point (a) of the first paragraph of Article 78 of the Directive provides, more particularly, that, in respect of the supply of goods, taxes, duties, levies and charges, excluding VAT itself, are to be included in the taxable amount.

31 Point (c) of the first paragraph of Article 79 of the Directive provides that amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account, are not to be included in the taxable amount.

32 In order to ascertain whether a tax such as ISV must be included in the taxable amount for VAT or must, on the contrary, be left out of that amount, it has to be determined, first, whether that tax falls within the definition of 'taxes, duties, levies and charges,' for the purpose of point (a) of the first paragraph of Article 78 of Directive 2006/112 and, secondly, whether it is covered by the exception provided for by point (c) of the first paragraph of Article 79 of the Directive.

33 As regards, first, point (a) of the first paragraph of Article 78 of Directive 2006/112, the Court has stated that if taxes, duties, levies and charges are to fall within the basis of assessment, even though they do not represent any added value and do

not constitute the financial consideration for the supply of the goods, they must be directly linked to that supply (judgment of 22 December 2010 in Case C-433/09 *Commission* v *Austria*, paragraph 34 and case-law cited).

34 In this regard, it is clear from the case-law that whether or not the supplier of the vehicle has paid a tax in his own name and on his own behalf is decisive in ascertaining whether a tax is to be included in the value of the goods supplied and, if so, that the consideration to be taken into account in computing the taxable amount must, as a general rule, include the amount of the tax in question (see, to that effect, the judgment of 20 May 2010 in Case C-228/09 *Commission* v *Poland*, paragraph 40).

35 In this instance, according to Article 3(1) of the CISV the tax is payable by registered operators, authorised operators and private individuals releasing for consumption vehicles liable to the tax, that is to say, those persons in whose name the customs declaration for vehicles or the supplementary declaration for vehicles is made. With regard to individuals, as defined by Article 16 of the CISV, it is apparent that they are merely residuary taxable persons, as maintained by the Portuguese Republic at the hearing.

36 It is, therefore, clear that in principle the expenditure paid by way of ISV was paid, not on behalf of the purchaser of the vehicle but by its supplier within the meaning of Article 73 of Directive 2006/112, a direct link being thus established between the supply transaction performed by the supplier and that tax.

37 To the same effect, it must be noted that, although supply is not expressly mentioned as the chargeable event for ISV, it is clear from Article 5(1) of the CISV that the chargeable events for this tax are all established as being carried out upstream and forming part of the supply transaction. The sums paid by the supplier by way of ISV by reason of the manufacture, assembly, admission or import into Portuguese territory of vehicles that must be registered in Portugal are, therefore, included in the

value of the vehicle supplied, as the Portuguese Republic has maintained. By so doing so, the purchaser of a vehicle subject to ISV paid by the supplier of that vehicle pays for a previous transaction carried out by that taxable person.

38 Furthermore, no direct legal connection can be made between ISV and the registration operation, unlike the circumstances of the tax at issue in the case giving rise to the judgment in *De Danske Bilimportører*. It may, in particular, be noted that the CISV provides for several cases in which ISV is not payable, notwithstanding the registration of a vehicle falling within its ambit. This is most particularly so in the case of the exemption, allowed in accordance with Article 58(1) of the CISV, for vehicles belonging to persons moving their residence to Portugal. It is also relevant here that both the chargeable event and the liability to pay ISV predate the registration operation, as is made clear by Article 27 of the CISV, according to which a vehicle liable to the tax may be registered only if all the relevant taxes and duties have been paid.

39 Accordingly, a tax such as ISV must be regarded as directly linked to the supply of vehicles falling within its ambit and, in consequence, be included in the taxable amount for VAT in accordance with point (a) of the first paragraph of Article 78 of Directive 2006/112.

40 As regards, in the second place, point (c) of the first paragraph of Article 79 of Directive 2006/112, it cannot reasonably be maintained that the expenditure incurred by a registered operator or an authorised operator by way of ISV was incurred in the name and on behalf of the purchaser of the vehicle in question. To that effect, it is enough to state that, as is apparent from paragraph 35 above, the persons liable to pay ISV are the suppliers of the vehicles, not their purchasers (see, by analogy, *Commission* v *Austria*, paragraph 48).

41 A tax such as ISV may not, therefore, be left out of the taxable amount for VAT under point (c) of the first paragraph of Article 79 of Directive 2006/112.

42 Having regard to the foregoing, the answer to be given to the question referred is that a tax such as ISV, at issue in the main proceedings, the chargeable event for which is linked directly to the supply of a vehicle falling within the ambit of that tax and which is paid by the supplier of that vehicle, is covered by the definition of 'taxes, duties, levies and charges' for the purpose of point (a) of the first paragraph of Article 78 of Directive 2006/112 and must, pursuant to that provision, be included in the taxable amount for VAT on the supply of that vehicle.

Costs

43 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 (Seventh Chamber) hereby rules:

1. A tax such as vehicle tax (imposto sobre veículos), at issue in the main proceedings, the chargeable event for which is linked directly to the supply of a vehicle falling within the ambit of that tax and which is paid by the supplier of that vehicle, is covered by the definition of 'taxes, duties, levies and

charges' for the purpose of point (a) of the first paragraph of Article 78 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and must, pursuant to that provision, be included in the taxable amount for value added tax on the supply of that vehicle.

[Signatures]