JUDGMENT OF THE COURT (Third Chamber)

8 December 2005 *

In Case C-280/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 25 June 2004, received at the Court on 29 June 2004, in the proceedings

Jyske Finans A/S

v

Skatteministeriet

intervening parties:

Nordania Finans A/S,

BG Factoring A/S,

* Language of the case: Danish.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský (Rapporteur), J.-P. Puissochet, S. von Bahr and U. Lõhmus, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 7 July 2005,

after considering the observations submitted on behalf of:

— Jyske Finans A/S, by E. Malberg, advokat,

— Nordania Finans A/S and BG Factoring A/S, by H. Severin Hansen and T. K. Kristjansson Plesner, advokaterne,

— the Danish Government, by J. Molde, acting as Agent, assisted by P. Biering, advokat,

— the Greek Government, by I. Pouli and V. Kyriazopoulos, acting as Agents,

— the Polish Government, by J. Pietras, acting as Agent,

— the Commission of the European Communities, by L. Ström van Lier and T. Fich, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 13B(c) and 26aA(e) 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 94/5/EC of 14 February 1994 (OJ 1994 L 60, p. 16, 'the Sixth Directive')

2 The reference was made in the course of proceedings between Jyske Finans A/S ('Jyske Finans') and Skatteministeriet (Danish Finance Ministry) concerning value added tax ('VAT') which was claimed from that company by reason of its activities of reselling cars purchased second-hand.

Law

Community legislation

3 Article 2(1) of the Sixth Directive provides that the supply of goods effected for consideration by a taxable person acting as such shall be subject to value added tax.

4 Article 11A(1)(a) of that directive establishes the taxable amount, in respect of those supplies of goods, as being everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party.

5 Article 13B of that directive provides:

'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 the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(c) ... goods on the acquisition or production of which, by virtue of Article 17(6), value added tax did not become deductible;

...'

6 Under the terms of Article 17(6) of the Sixth Directive:

'Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax.

...

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force.'

7 Article 26a of the Sixth Directive, inserted by Article 1(3) of Directive 94/5, prescribes special VAT arrangements applicable to second-hand goods, works of art, collectors' items and antiques. Under that Article 26a, supplies of those goods effected by a taxable dealer are taxed only on the profit margin, that is, the difference between the selling price charged by the taxable dealer for the goods and the purchase price.

8 According to the third and fifth recitals of Directive 94/5, these special arrangements are aimed at avoiding double taxation and distortion of competition between taxable persons.

9 Under Article 26aA(e) of the Sixth Directive the taxable dealer is defined as 'a taxable person who, in the course of his economic activity, purchases or acquires for the purposes of his undertaking, or imports with a view to resale, second-hand goods'.

National legislation

10 Article 8(1) of the VAT Law ('the momslov'), as amended by Law No 375 of 18 May 1994 and by Amending Law No 1114 of 21 December 1994 ('the VAT Law'), provides:

'Supply for consideration includes the sale of an undertaking's assets in the case where a full or partial right of deduction has been acquired in connection with the purchase, manufacture and so forth of the asset.'

11 According to Article 13(2) of the VAT Law:

'The supply of goods applied solely in connection with a business that is exempted from tax under subparagraph (1) or the supply of goods the acquisition or use of which has been excluded from the right to deduct under Chapter 9, is exempt from [VAT].'

12 In Chapter 9 of that law, Article 42(1)(7) provides that undertakings cannot deduct input tax that relates to 'the acquisition and operation of personal motor vehicles that are equipped to carry no more than nine persons (see, however, subparagraphs 4, 6 and 7)'.

13 According to Article 42(6):

'Undertakings which deal in or lease motor vehicles or which operate schools of motoring may, notwithstanding the provision in subparagraph (1)(7), deduct the tax on purchases ... for those purposes.'

14 Chapter 17 of that law transposes the provisions of Directive 94/5 in relation to the special arrangements applicable to, in particular, second-hand goods.

15 In that Chapter 17, Article 69(1) provides:

'Undertakings which, with a view to resale, purchase inter alia second-hand goods, works of art, collectors' items and antiques, may at the time of resale pay the tax on the goods in question etc. under the rules in this Chapter.'

The main proceedings and the questions referred for a preliminary ruling

16 Jyske Finans operates a car-leasing business. In operating this business, it purchases either new or second-hand motor cars. For the latter, the purchase is made without the possibility of deducting the VAT included in the price, the vendors being unable, according to the national legislation, to declare VAT on the price of the car.

17 Between 1 January 1999 and 31 May 2001, Jyske Finans, at the end of the sale-and-leaseback, resold 145 vehicles which had been purchased second-hand. In May 2001 the Danish tax authorities requested that Jyske Finans pay VAT, which, according to them, was due on those resales in the amount of DKK 2 236 413 (approximately EUR 299 500).

18 Jyske Finans disputed this liability before the Vestre Landsret, maintaining that to pay the VAT would mean double taxation, as it had not been able to exercise the right to deduct the VAT which remains incorporated in the purchase price of second-hand cars and which is not declared. It maintained that the decision of the tax authorities had no legal basis in the VAT Law and was contrary to the Sixth Directive. Nordania Finans A/S and BG Factoring A/S intervened in that action in support of Jyske Finans.

19 The Vestre Landsret considered that the main proceedings related to whether, firstly, the tax demand was contrary to Article 13B(c) of the Sixth Directive and, secondly, whether Jyske Finans was entitled to rely on the special arrangements, provided for in Article 26a of that same directive, for taxing the profit margin applicable to second-hand sales. It considered that the outcome of the main proceedings depended on the interpretation which it was appropriate to give to those two provisions of that directive. In those circumstances the Vestre Landsret decided to stay proceedings and refer to the Court of Justice the following questions for a preliminary ruling:

'(1) Must Article 13B(c), in conjunction with Articles 2(1) and 11A(1)(a), of the Sixth Directive ... be construed as precluding a Member State from maintaining a legal situation under its law on value added tax pursuant to which a taxable person who has introduced capital goods to a significant extent into his business assets is, in contrast to second-hand car dealers and other traders who sell

second-hand cars, liable to VAT on the sale of those capital items, even in the case where the items were purchased from taxable persons who did not declare tax on the price of the items, with the result that there was no possibility of deducting VAT at the time of acquisition?

(2) Must Article 26aA(e) of the Sixth Directive be construed as meaning that the term "taxable dealer" covers only persons whose principal activity consists in the purchase and sale of second-hand goods in cases where the second-hand goods in question are acquired with the sole or principal purpose of obtaining a financial profit on their resale, or does that term also cover persons who normally dispose of those goods by sale at the end of a leasing period as a subsidiary link in the overall economic leasing activity under the circumstances outlined above?'

Consideration of the questions

The first question

20 By its first question the referring court essentially asks whether Article 13B(c) of the Sixth Directive is to be construed as meaning that the VAT exemption which it provides for the supply of goods on the acquisition of which value added tax did not become deductible by virtue of Article 17(6) of that directive precludes national legislation imposing VAT on transactions by which a taxable person resells, after having used them for the purposes of his business, goods, the acquisition of which from taxpayers who were unable to declare VAT on them did not, for that reason, give rise to a right to deduct.

21 It should be noted at the outset that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since these exemptions constitute exceptions to the general principle, in accordance with Article 2 of that directive, that VAT is to be levied on all goods or services supplied for consideration by a taxable person acting as such (see, in particular, Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 36, and Case C-428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527, paragraph 29).

22 It should also be borne in mind that, under Article 17(6) of the Sixth Directive, the Member States are authorised to retain their existing legislation as at the date of entry into force of that directive in regard to exclusion from the right of deduction until such time as the Council has adopted the provisions envisaged by that article (see Case C-345/99 *Commission* v *France* [2001] ECR I-4493, paragraph 19).

23 Since none of the proposals put to the Council by the Commission under the first subparagraph of Article 17(6) of the Sixth Directive has been adopted by the Council, the Member States may retain their existing legislation in regard to exclusion from the right to deduct VAT until such time as the Community legislature has established a Community system of exclusions and brought about the progressive harmonisation of national VAT legislation (*Commission* v *France*, cited above, paragraph 20). Community law therefore does not yet contain any provision listing the expenditure excluded from the right to deduct VAT.

24 The exemption provided for by Article 13B(c) of the Sixth Directive therefore can apply only to supplies of goods on the acquisition of which value added tax did not become deductible in accordance with national legislation. The terms of that article are not capable, in that regard, of any other interpretation which would allow a taxable person, who could not take advantage of such an exemption, to avoid double taxation.

25 Where national law, such as that referred to in the main proceedings, provides that undertakings which carry on the business of leasing motor cars can deduct the tax on acquisitions for this activity, it follows that the acquisition of a car, by an undertaking of this nature, is not, within the meaning of Article 13B(c) of the Sixth Directive, an acquisition of goods on which, by virtue of Article 17(6) of that directive, VAT did not become deductible. The resale of that car cannot therefore be regarded as being one of the supplies benefiting from the exemption provided in Article 13B(c). The fact that such a purchase did not give rise to a right to deduct by reason of the fact that, like in the main proceedings, it involved vendors who themselves could not, according to the national legislation, deduct the input tax relating to their purchase of cars and, accordingly, did not declare output VAT, has no bearing on the classification of that purchase for the application of that same Article 13.

26 In the circumstances the answer to the first question must be that the provisions of Article 13B(c) of the Sixth Directive are to be construed as meaning that they do not preclude a national law which imposes VAT on transactions by which a taxable person, after having used them for the purposes of its business, resells goods on the acquisition of which, by virtue of Article 17(6), value added tax did not become deductible, even where that acquisition, made from taxable persons who could not declare VAT, did not, for that reason, give rise to a right to deduct.

The second question

27 By its second question the referring court essentially asks whether a taxable person who, in the normal course of his activities, resells cars which he purchased second-hand with a view to using them in his sale and leaseback business, can be considered to be a 'taxable dealer' within the meaning of Article 26a of the Sixth Directive.

28 That article, inserted by Directive 94/5, applies special arrangements for taxing the profit margin made by the taxable dealer on the supply of second-hand goods, works of art, collector's items and antiques.

29 It should be borne in mind that the provisions of Article 26aA(e) of the Sixth Directive define 'taxable dealer' as a taxable person who, in the course of his economic activity, purchases or acquires for the purposes of his undertaking, or imports with a view to resale, second-hand goods and/or works of art, collectors' items or antiques.

30 Many versions of the Sixth Directive, including the English-language version, could suggest that the expression 'with a view to resale' only applies to the verb 'import', which appears immediately before it. It could accordingly be conceded that, for purchasing activities, the only ones at issue in the main proceedings, the text of the Sixth Directive does not require that, in order to come within the definition of taxable dealer, the person concerned had, at the moment of purchase of the second-hand goods, the intention of reselling them. In those circumstances nothing would permit the exclusion from this definition of a sale and leaseback undertaking, like Jyske Finans, which purchases second-hand goods in the course of its business.

31 It must be noted in that regard that it is settled case-law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in all the Community languages (see, to that effect, inter alia, Case 19/67 *Van der Vecht* [1967] ECR 345, 354; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 15; and Case C-371/02 *Björnekulla Fruktindustrier* [2004] ECR I-5791, paragraph 16). Where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 42, and Case C-1/02 *Borgmann* [2004] ECR I-3219, paragraph 25).

32 It follows from the second, third and fifth recitals of Directive 94/5 that the Community legislator sought to achieve some harmonisation of very different arrangements applicable in the Member States concerning the taxation of second-hand goods, works of art, collectors' items or antiques in order to avoid double taxation and distortions of competition, both within those Member States and in relations between them. In the circumstances, to interpret the expression 'with a view to resale' as relating only to import activities would be contrary to the overall objective of putting in place uniform arrangements in the areas of second-hand goods, works of art, collectors' items and antiques, which the Community legislature had thereby set itself. Consequently, that expression should be considered to apply also to purchases and acquisitions for the purposes of the undertaking.

33 It is therefore necessary to answer the question of whether, in referring to a taxable dealer who purchases second-hand goods 'with a view to resale', the Sixth Directive includes only a taxable person who merely carries out, after the purchase, essentially technical steps of preparing the vehicles with the aim of proceeding directly and immediately to the resale of those vehicles, or whether it also includes a taxable person who carries on an activity of leasing cars before reselling them. Such a leasing activity is, in fact, in its aim, independent of the reselling activity, which is likely to occur only at the end of a long period or even to not occur at all, taking into account the unknown factors, such as wear and tear and destruction, inherent in the leasing of vehicles. In other words, it is necessary to establish whether the definition of the taxable dealer also covers the situation, such as that in the main proceedings, in which, for the taxable person concerned, the resale, at the moment of purchase of the second-hand goods, is not in fact the principal objective but only its secondary objective, ancillary to that of leasing.

34 It should be borne in mind that, in determining the scope of a provision of Community law, its wording, context and objectives must all be taken into account (Case C-162/91 *Tenuta il Bosco* [1992] ECR I-5279, paragraph 11; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 27; and Case C-321/02 *Harbs* [2004] ECR I-7101, paragraph 28).

35 It is true that the arrangements for the taxation of the profit margin made by the taxable dealer on the supply of second-hand goods, works of art, collectors' items and antiques constitute a special arrangement for VAT — derogating from the general scheme of the Sixth Directive — which, like the other special arrangements provided for in Articles 24, 25 and 26 of that directive, must be applied only to the extent necessary to achieve their objective (see, respectively, for the application of the arrangements provided for in Article 26 and Article 25, Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 34, and *Harbs*, cited above, paragraph 27).

36 However, the fact remains that the interpretation of the terms used by the provisions of Article 26a of the Sixth Directive must be consistent with the objectives pursued by the special arrangements established by that article and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT.

37 In that regard, it is appropriate to point out that the third and fifth recitals to Directive 94/5 show the intention of the Community legislature to avoid double taxation and distortions of competition (see Case C-320/02 *Stenholmen* [2004] ECR I-3509, paragraph 25).

38 To tax, on the overall sale price, the supply by a sale and leaseback undertaking of a car which it purchased second-hand, when, at the time of that purchase it was not able to deduct the VAT which remained incorporated in the purchase price, gives rise to the risk of double taxation.

39 Moreover, in accordance with the principle of fiscal neutrality on which, in particular, the common system of VAT established by the Sixth Directive is based, economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT (see Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraphs 23 and 24).

40 On the market for sales of second-hand cars, taxation on the overall sale price of the supply by sale and leaseback undertakings would create a distortion of competition to their detriment and in favour, in particular, of firms trading in second-hand vehicles which benefit from the taxation scheme based on the profit margin. As a means of satisfying purchasers' legitimate expectation to pay the same price for vehicles of the same quality, whether they are sold by an undertaking trading in second-hand cars or by a sale and leaseback undertaking, the latter could not reasonably be expected to absorb in the sale price the amount of the VAT owed by it and thereby reduce its margin.

41 The application of the arrangements provided for in Article 26a of the Sixth Directive to sale and leaseback undertakings allows in those circumstances precisely the achievement of the aim of the Community legislature in adopting those arrangements, that is, to avoid double taxation and distortions of competition in the area of second-hand goods.

42 In the circumstances, taking account of the aims of Article 26a of the Sixth Directive, that article is to be interpreted as meaning that it does not exclude from the category of taxable dealer sale and leaseback undertakings which purchase cars second-hand, when the resale forms part of their normal business and the intention to resell is present at the moment of purchase, even when the reselling is secondary in comparison with the leasing.

43 It is also appropriate to state that at the hearing the Commission indicated that the Member States did not accept the proposal, which was made to them in the context of a draft 'Seventh Directive', to adopt a common scheme for taxation of supplies of second-hand goods under which, in order also to avoid double taxation, VAT on used goods could be reconstituted before their final resale in order thereby to allow both deduction of that VAT and assessment of VAT on the overall sale price.

Consequently, even supposing that, de lege ferenda, such, or another system, would allow levying of VAT also on such supplies, it would not be contrary to the Court's interpretation of Article 26a of the Sixth Directive, which is the only rule of Community law applicable at this point in time in the present case.

44 In light of all of the foregoing, the answer to the second question must be that Article 26aA(e) of the Sixth Directive is to be construed as meaning that an undertaking which, in the normal course of its business, resells cars which it had purchased second-hand with a view to using them for the purposes of its business of sale and leaseback and for which the resale is not, at the time of the purchase of the second-hand goods, the principal objective but only its secondary objective, ancillary to that of leasing, can be considered to be a 'taxable dealer' within the meaning of that provision.

Costs

45 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:

1. The provisions of Articles 13B(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 94/5/EC of 14 February 1994 are to be construed as meaning that they do not preclude a national law which imposes value added tax on transactions by which a taxable person, after having used them for the purposes of its business, resells goods on the acquisition of which, by virtue of Article 17(6), value added tax did not become deductible, even where that acquisition, made from taxable persons who could not declare value added tax, did not, for that reason, give rise to a right to deduct.

2. **Article 26aA(e) of Sixth Directive 77/388, as amended by Directive 94/5, is to be construed as meaning that an undertaking which, in the normal course of its business, resells cars which it had purchased second-hand with a view to using them for the purposes of its business of sale and leaseback and for which the resale is not, at the time of the purchase of the second-hand goods, the principal objective but only its secondary objective, ancillary to that of leasing, can be considered to be a 'taxable dealer' within the meaning of that provision.**

[Signatures]