

JUDGMENT OF THE COURT (First Chamber)

8 December 2005^{*}

In Case C-220/03,

ACTION under Article 238 EC, brought on 21 May 2003,

European Central Bank, represented by C. Zilioli and M. Benisch, acting as Agents, assisted by H.-G. Kamann and M. Selmayr, Rechtsanwälte, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by U. Forsthoff, acting as Agent, assisted by W. Hölters, Rechtsanwalt,

defendant,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann (Rapporteur), K. Lenaerts, E. Juhász and M. Ilešič, Judges,

Advocate General: C. Stix-Hackl,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2005,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2005,

gives the following

Judgment

- 1 By its action, the European Central Bank (ECB) is in essence asking the Court to rule that the Federal Republic of Germany is required to refund to it, in respect of all supplies of goods and services which it requires for its official use in Germany, and in particular of all leasing or letting of property, the amounts of turnover tax which can be proved, or at least assumed, on the basis of a rational economic assessment, to be included in the prices paid by that institution. In addition to such a statement

of principle, the ECB asks that that Member State be ordered to refund to it the sums of EUR 8 794 023.37 in respect of that tax included in rent paid by it and EUR 1 925 689.23 in respect of turnover tax included in ancillary costs and various work carried out in connection with that leasing or letting.

Legal context

2 The ECB bases its claims, brought under an arbitration clause contained in the Agreement of 18 September 1998 concluded between the Government of the Federal Republic of Germany and the European Central Bank on the seat of that institution (BGBI. 1998 II, p. 2745) ('the Agreement'), on Article 8(1) of that Agreement, interpreted in the light of the second paragraph of Article 3 and the first paragraph of Article 23 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (JO 1967 152, p. 13) ('the Protocol').

3 Article 291 EC provides:

'The Community shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Communities. The same shall apply to the European Central Bank, the European Monetary Institute, and the European Investment Bank.'

The Protocol

4 The second paragraph of Article 3 of the Protocol provides:

'The Governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes

included in the price of movable or immovable property, where the Communities make, for their official use, substantial purchases the price of which includes taxes of this kind. These provisions shall not be applied, however, so as to have the effect of distorting competition within the Communities.’

- 5 The first paragraph of Article 23 of the Protocol states that it applies to the ECB.

The Agreement

- 6 In accordance with the fifth paragraph of its preamble, the Agreement is intended to ‘define the privileges and immunities of the European Central Bank in the Federal Republic of Germany in accordance with the Protocol on the Privileges and Immunities of the European Communities’.

- 7 Article 8(1) of the Agreement provides:

‘Pursuant to the second paragraph of Article 3 of the Protocol, the Bundesamt für Finanzen (Federal Finance Office) shall refund on demand, out of the revenue received in the form of turnover tax, the turnover tax invoiced separately to the ECB by undertakings for the various supplies of goods and services made to the ECB, where those supplies are intended for the official use of the ECB. The amount of tax due in respect of those supplies must exceed DEM 50 in each case and must have been paid to the undertaking by the ECB. ...’

8 Article 21 of the Agreement sets out the following arbitration clause:

‘Any dispute between the Government [of the Federal Republic of Germany] and the ECB with regard to the interpretation or the application of this Agreement which cannot be settled directly by the parties thereto may be brought before the Court of Justice of the European Communities by either of the parties in accordance with Article 35.4 of the Statutes of the ESCB [European System of Central Banks and the European Central Bank].’

The Statutes of the ESCB

9 Article 35.4 of the Protocol on the Statutes of the European System of Central Banks and of the European Central Bank annexed to the EC Treaty (‘the Statutes of the ESCB’) states as follows:

‘The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.’

Provisions concerning turnover tax

10 The Law on the imposition of turnover tax (Umsatzsteuergesetz), of which the version relevant to the present dispute is that of 9 June 1999 (BGBl. 1999 I, p. 1270)

(‘the UStG’), is intended to transpose into German law the provisions 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’).

- 11 Pursuant to Paragraph 4(12)(a) of the UStG, which is based on Article 13B(b) of the Sixth Directive, the leasing or letting of immovable property is exempt from turnover tax. That exemption extends to all services ancillary to the leasing or letting and, in particular, to the charges which the lessor imposes on the lessee under the lease.

- 12 Paragraph 9(1) of the UStG, which is based on Article 13C of the Sixth Directive, provides for the possibility of treating as subject to that tax a transaction which would normally be exempt pursuant to Paragraph 4(12)(a) of that law, if that transaction is carried out for the benefit of a trader performing services which are themselves subject to turnover tax and which permit deduction of the input tax paid.

- 13 The ECB is not a trader in terms of German tax law and consequently the lessors of immovable property leased by it cannot avail themselves of the possibility, set out in Paragraph 9(1) of the UStG, of treating the leasing or letting of immovable property to that institution and the supply of services ancillary thereto as being transactions subject to turnover tax. That option for taxation is, moreover, also precluded by German tax law, since the ECB, in the same way as banks and insurance companies in the private sector, carries out only transactions which exclude the deduction of input tax.

- 14 Pursuant to Paragraph 15(1) of the UStG, which is based on Article 17(2) of the Sixth Directive, traders carrying out operations subject to turnover tax attributed to them may deduct from it the amount which they have paid in input tax to their suppliers for intermediate services. However, that possibility is not available to them in respect of transactions which are tax-exempt, as are, pursuant to Paragraph 4(12) (a) of the UStG, the letting or leasing of immovable property and the supply of services ancillary to that letting or leasing since, in that case, no turnover tax is imposed and therefore no deduction is possible.

Facts

- 15 The ECB leases a number of buildings in Frankfurt (Germany), the city in which it has its seat. The two main buildings are:
- the Eurotower building at 29 Kaiserstraße ('Eurotower'), and
 - the Eurotheum building at the junction of Neue Mainzer Straße and Junghofstraße ('Eurotheum').
- 16 It is common ground that, pursuant to Paragraph 4(12)(a) of the UStG, the leasing of those buildings is exempt from turnover tax. In the same way, in accordance with the principle that ancillary services follow the same regime as the principal service, the charges ancillary to the leases (maintenance costs, electricity, water, insurance,

etc.; ‘the charges’) are also exempt from that tax. Consequently, the lessors who lease or let buildings to the ECB and deal with the ancillary charges do not invoice the institution for turnover tax in respect of those transactions.

17 The lessors are themselves subject to turnover tax in respect of all ancillary services supplied in connection with the buildings which they lease (building work, alterations, maintenance and electricity, water and insurance expenditure, etc.; ‘the input transactions’). If the lease granted by a lessor were subject to such a tax, it is common ground that the lessor could, pursuant to Paragraph 15(1) of the UStG, deduct, from the tax payable in respect of his taxable transactions, that tax which he himself has paid on the input operations (‘the input tax’). He would thus be able to recover that amount.

18 For that reason, the lessors have an incentive to exercise the option conferred on them by Paragraph 9(1) of the UStG to treat as a transaction subject to turnover tax a lease that would normally be exempt from that tax. Where that option is available to the lessor, that is to say when leases are entered into for the benefit of lessees who are themselves traders carrying out taxable transactions, the lessee may then himself deduct the amount of the turnover tax levied on the lease from the tax paid by him on the transactions which he concludes. The lessee can thus, in principle, recover the amount of the tax paid on the amount of the rent and the fact that the lessor has opted to be subject to the tax has no negative financial consequences for the lessee.

- 19 According to the ECB, that system of exemptions has the result of forcing it to pay to its lessors the amounts of turnover tax which they have paid on their input transactions. In effect, the lessors calculate the rents on the basis of their profit margin and, consequently, impose higher rents on tenants such as the ECB, to whom the input tax cannot be re-invoiced. Although those amounts do not appear separately on the invoices, according to the ECB, it is possible to show that they are included in the rent and the charges for which it is invoiced. The ECB deduces from this that it is paying hidden turnover tax.
- 20 The Federal Republic of Germany disputes the contention that amounts of turnover tax are included in the rent and charges paid by the ECB. It submits that a large number of other lessees, including banks and insurance companies in the private sector, are in the same tax position as the ECB. The rent and charges are fixed by the market and the ECB has not any adduced evidence that the rent and charges which it pays are increased by amounts corresponding substantially to those of the input tax paid by the lessors on their taxable transactions connected with the lease.
- 21 By letter of 9 April 2001, the Finanzamt Wiesbaden, which is the local tax office concerned, refused to grant the ECB's application for a refund of the turnover tax which, according to the ECB, was included in the invoices for rent and charges sent to it by its lessors. The ECB has contested that refusal, relying on Article 8(1) of the Agreement and on the second paragraph of Article 3 of the Protocol. Since the dispute between the German tax authorities and the ECB has not been resolved, the latter has brought the present action.

Admissibility of the action

22 The Federal Republic of Germany disputes the admissibility of the action in the light both of the Protocol and of the Agreement.

23 Firstly, according to the Federal Republic of Germany, the arbitration clause set out in Article 21 of the Agreement applies expressly and solely to disputes concerning the interpretation or the application 'of this Agreement'. On that basis, it takes the view that the Court does not have jurisdiction in matters concerning the interpretation and application of the Protocol, in particular with regard to the direct application of the second paragraph of Article 3 thereof, and that the action is, in that regard, inadmissible.

24 On that point, it is sufficient to note, as the ECB submitted at the hearing, that the application does not seek an interpretation or direct application of the second paragraph of Article 3 of the Protocol, but concerns only the application of Article 8 (1) of the Agreement, which must be interpreted in the light of the second paragraph of Article 3 of the Protocol, of which Article 8(1) constitutes the specific implementation in the present context. The Court has jurisdiction, pursuant to the arbitration clause set out in Article 21 of the Agreement, to interpret and apply Article 8(1) of that Agreement in the light of the legal context of which that provision forms part.

25 Secondly, the Federal Republic of Germany contends that the arbitration clause, which is, in accordance with the Court's established case-law, to be interpreted

strictly, is not applicable to the present dispute, because there are no 'disputes on the interpretation or the application of the Agreement'. It is common ground between the Federal Republic of Germany and the ECB that Article 8(1) of the Agreement provides, on its wording, only for the refund of turnover tax invoiced separately and therefore that provision is not applicable, since the present case does not involve a refund of such a tax.

- 26 In that regard, the ECB submits, rightly, that there is a manifest dispute between it and the Federal Republic of Germany concerning the interpretation and application of Article 8(1) of the Agreement, in particular with regard to whether a wider interpretation of that provision is necessary in the light of the second paragraph of Article 3 of the Protocol, such that that Member State would be required to refund turnover tax to the ECB not only when that tax is invoiced separately, as the wording of Article 8(1) provides, but also where it is possible to establish, even in the absence of separate invoicing, that such a tax has actually been paid by the ECB.
- 27 Having regard to those considerations, the objections of inadmissibility raised by the Federal Republic of Germany must be dismissed and the Court must be held to have jurisdiction pursuant to Article 21 of the Agreement, read in conjunction with Articles 238 EC and 35.4 of the Statutes of the ESCB, to rule on the ECB's action.

Substance

- 28 It is common ground that Article 8(1) of the Agreement provides, according to the actual terms of that provision, only for a refund of turnover tax 'invoiced separately

... for the various supplies of goods and services' made to the ECB. It is also common ground that no turnover tax is levied on those supplies and services and that, therefore, no tax can be invoiced separately 'for' those supplies and services.

29 Nevertheless, the ECB submits that, read in the light of the second paragraph of Article 3 of the Protocol, Article 8(1) of the Agreement provides not only for a refund of turnover tax invoiced separately, but also for a refund of any turnover tax included in the prices paid by the ECB and, therefore, of the turnover tax indirectly paid by that institution because of the passing on of that tax in the rent invoiced by its lessors, regardless of whether that invoicing was made separately or not. That, the ECB argues, follows from the fact that the second paragraph of Article 3 of the Protocol expressly provides for a refund of turnover tax by Member States 'wherever possible' and, moreover, requires them generally to refund 'the amount of indirect taxes ... included in the price of movable or immovable property'.

30 That argument cannot be accepted.

31 Article 8(1) of the Agreement expressly and unambiguously makes the refund of turnover tax subject to the condition, not fulfilled in the present case, that that tax be 'invoiced separately'. Although an interpretation of a provision of an Agreement 'in the light' of its legal context is possible in principle to resolve a drafting ambiguity, such an interpretation cannot have the result of depriving the clear and precise wording of that provision of all effectiveness.

- 32 Furthermore, the condition that the tax be 'invoiced separately' is contrary neither to the aims nor to the wording of the second paragraph of Article 3 of the Protocol. That provision merely provides for the adoption of 'appropriate measures' with a view to tax refunds only with regard to 'substantial purchases' and only 'wherever possible'. A margin of discretion is thus granted to the Community institutions and the Member States in the conclusion of agreements concerning the implementation of the second paragraph of Article 3 of the Protocol.
- 33 The exclusion of a refund of tax which is not invoiced to the ECB but which is paid as input tax by the other parties to its agreements and which may therefore affect the prices invoiced to it does not go beyond that margin of discretion. The same is true of the limit of DEM 50 fixed by the Agreement for the refund of tax. Those requirements therefore comply with the Protocol.
- 34 Moreover, the abovementioned condition safeguards the financial interests of both the European Community and the host Member State, since it avoids public funds being used for the implementation of detailed and complex refund procedures intended to prove that part of the expenditure borne by the ECB corresponds, in reality, to an input tax paid by a party to its agreements.
- 35 Finally, it should be added that the order in Case 2/68 *Ufficio Imposte di Consumo di Ispra v Commission* [1968] ECR 435, relied upon by the ECB, is entirely irrelevant to the present case, since that order was made with regard to a situation in which the Commission of the European Communities had, in an agreement concluded with the Italian Government, attempted to restrict the rights and guarantees benefiting third parties not party to that agreement, pursuant to the Protocol.

36 Having regard to those considerations, the ECB's action must be dismissed.

Costs

37 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany has applied for the ECB to be ordered to pay the costs and the latter has been unsuccessful, the ECB must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Central Bank to pay the costs.**

[Signatures]