JUDGMENT OF THE COURT (Third Chamber)

22 April 2010 *

In Joined Cases C-536/08 and C-539/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decisions of 14 November 2008, received at the Court on 4 December 2008, in the proceedings

Staatssecretaris van Financiën

v

X (C-536/08),

and **fiscale eenheid Facet-Facet Trading** (C-539/08),

* Language of the cases: Dutch.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 November 2009,

after considering the observations submitted on behalf of:

— fiscale eenheid Facet-Facet Trading, by H.W.M. van Kesteren and M.A.J. Raafs, advocaten,

— the Netherlands Government, by C. Wissels, M. Noort and M. de Grave, acting as Agents,

— the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

— the Commission of the European Communities, by D. Triantafyllou and C. ten Dam, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The present references for a preliminary ruling concern the interpretation of Articles 17(2) and (3) and 28b(A)(2) 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 (OJ 1992 L 384, p. 47) ('the Sixth Directive').

2 The references have been made in the course of proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) ('the Staatssecretaris') and X and between the Staatssecretaris and Facet-Facet Trading ('Facet') in the context of additional assessments for value added tax ('VAT').

Legal context

Community legislation

3 Article 17(1) to (3) of the Sixth Directive provides:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. 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:

…

(d) value added tax due pursuant to Article 28a(1)(a).

3. Member States shall also grant to every taxable person the right to a deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

(a) transactions relating to the economic activities referred to in Article 4(2) carried out in another country, which would be eligible if they had been performed in the territory of the country;

(b) transactions which are exempt pursuant to Article 14(1)(i), 15, 16(1)(B), (C), (D) or (E) or (2) or 28c(A) and (C);

(c) any of the transactions exempted under Article 13B(a) and (d)(1) to (5), when the customer is established outside the Community or when those transactions are directly linked with goods to be exported to a country outside the Community.'

4 Article 28a(1)(a) of the Sixth Directive provides:

'The following shall also be subject to value added tax:

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B)(1).'

5 Article 28a(3) of the Sixth Directive provides:

'"Intra-Community acquisition of goods" shall mean acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported.'

6 Article 28b(A) of the Sixth Directive provides:

'1. The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.

2. Without prejudice to paragraph 1, the place of the intra-Community acquisition of goods referred to in Article 28a(1)(a) shall, however, be deemed to be within the territory of the Member State which issued the value added tax identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that that acquisition has been subject to tax in accordance with paragraph 1.

If, however, the acquisition is subject to tax in accordance with paragraph 1 in the Member State of arrival of the dispatch or transport of the goods after having been subject to tax in accordance with the first subparagraph, the taxable amount shall be

reduced accordingly in the Member State which issued the value added tax identification number under which the person acquiring the goods made the acquisition.

For the purposes of applying the first subparagraph, the intra-Community acquisition of goods shall be deemed to have been subject to tax in accordance with paragraph 1 when the following conditions have been met:

— the acquirer establishes that he has effected this intra-Community acquisition for the needs of a subsequent supply effected in the Member State referred to in paragraph 1 and for which the consignee has been designated as the person liable for the tax due in accordance with Article 28c(E)(3),

— the obligations for declaration set out in the last subparagraph of Article 22(6)(b) have been satisfied by the acquirer.'

7 Article 28c(E)(3) of the Sixth Directive provides:

'Member States shall take specific measures to ensure that value added tax is not charged on the intra-Community acquisition of goods effected, within the meaning of Article 28b(A)(1), within its territory when the following conditions are met:

— the intra-Community acquisition of goods is effected by a taxable person who is not established in the territory of the country but who is identified for value added tax purposes in another Member State,

— the intra-Community acquisition of goods is effected for the purpose of a subsequent supply of goods made by a taxable person in the territory of the country,

— the goods so acquired by this taxable person are directly dispatched or transported from another Member State than that in which he is identified for value added tax purposes and destined for the person for whom he effects the subsequent supply,

— the person to whom the subsequent supply is made is a taxable person or a non-taxable legal person who is identified for value added tax purposes within the territory of the country,

— the person to whom the subsequent supply is made has been designated in accordance with Article 21(1)(c) as the person liable for the tax due on the supplies effected by the taxable person not established within the territory of the country.'

8 Article 28d(1) of the Sixth Directive provides:

'The chargeable event shall occur when the intra-Community acquisition of goods is effected. The intra-Community acquisition of goods shall be regarded as being effected when the supply of similar goods is regarded as being effected within the territory of the country.'

9 Article 22(6)(b) of the Sixth Directive, in the version resulting from Article 28h, 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), provides:

'…

(b) Every taxable person identified for value added tax purposes shall also submit a recapitulative statement of the acquirers identified for value added tax purposes to whom he has supplied goods under the conditions provided for in Article 28c(A)(a) and (d), and of consignees identified for value added tax purposes in the transactions referred to in the fifth subparagraph.

The recapitulative statement shall be drawn up for each calendar quarter within a period and in accordance with procedures to be determined by the Member States, which shall take the measures necessary to ensure that the provisions concerning administrative cooperation in the field of indirect taxation are in any event complied with. …

…'

National legislation

10 Article 15 of the Law on turnover tax (Wet op de omzetbelasting) of 28 June 1968 (*Staatsblad* 1968, No 329) ('the Law on turnover tax') provides:

'The tax referred to in Article 2 which is deducted by the trader is:

…

b. the tax payable, in the declaration period, on the occasion of intra-Community acquisitions, within the terms of Article 17a(1), made by the trader, in so far as that trader is in possession of an invoice issued in accordance with the requirements;

c. the tax payable in the declaration period:

…

on the occasion of intra-Community acquisitions, within the terms of Article 17a(1), made by the trader, other than those referred to in Article 15(b);

…

If an application for a refund of the tax may be made pursuant to Article 30(1), (2) and (3), the trader may not deduct the tax.

…'

11 Article 17a of that law provides:

'An intra-Community acquisition of goods is an acquisition of goods following delivery of those goods by a trader in the course of his business, where those goods have been dispatched or transported from one Member State to another Member State.

…'

12 Article 17b of that law provides:

'The place of the intra-Community acquisition of goods is the place where the dispatch or transport ends.

Without prejudice to the provisions of paragraph 1, the intra-Community acquisition is effected in the Member State which issued the VAT identification number under which the acquisition was made, unless the purchaser establishes that tax has been levied in accordance with paragraph 1.

…'

13 Article 30(1) of the Law on turnover tax states:

'Subsequent to an application by the taxable person, a refund of the tax payable in connection with the intra-Community acquisition of goods shall be granted in cases where the tax has been levied in accordance with Article 17b(2) and where the person concerned shows that, in connection with the same acquisition, the tax has been levied in the Member State where the dispatch or transport ends.

…'

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

Case C-536/08

14 X, an undertaking which is established in the Netherlands, markets computers and computer accessories. Over the period from 1 January 1998 to 31 December 1999,

it purchased goods of that kind from undertakings having their registered offices in Member States other than the Netherlands and Spain ('the suppliers') and sold them on to customers established in Spain.

15 In the invoices addressed to X the suppliers did not charge value added tax (VAT), but referred to X's Netherlands VAT identification number. In the invoices sent to its customers, X subsequently referred to the application of Article 28c(E)(3) of the Sixth Directive.

16 In its tax return for the period from 1 January 1998 until 30 September 1998, X did not include any VAT due in respect of intra-Community acquisitions. Nor did it deduct any VAT in respect of those intra-Community acquisitions. Furthermore, it did not make any statements on intra-Community supplies, as referred to in Article 37a of the Law on turnover tax and in the final subparagraph of Article 22(6)(b) of the Sixth Directive.

17 By contrast, as regards the period from 1 October 1998 until 30 June 1999, X did include in its return the VAT due in respect of intra-Community acquisitions and it deducted that VAT. It also made statements on intra-Community supplies as referred to in the provisions cited in the preceding paragraph. As set out in the order for reference, it was not established that the goods in question were dispatched or transported directly to customers established in Spain as part of the transactions referred to in paragraph 14 of this judgment.

18 As he took the view that X had acquired the goods in question within the terms of Article 17a of the Law on turnover tax, the Inspecteur van de Belastingdienst (Inspector of Taxes, 'the Inspector') imposed on the party concerned, in respect of the abovementioned period, an additional assessment to VAT. He took the view that X had acquired those goods in the Netherlands pursuant to Article 17b of that law and

Article 28b(A)(2) of the Sixth Directive. Following an objection lodged by X against that decision, the Inspector upheld the imposition and in addition found that X had no right of deduction in respect of those intra-Community acquisitions.

19 X appealed to the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) against that decision. By judgment of 22 April 2005, that court declared the appeal to be well founded, set aside the contested decision and reduced the amount of the additional assessment. The Staatssecretaris appealed in cassation against that judgment to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

20 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 17(2) and (3) and Article 28b(A)(2) of the Sixth Directive be interpreted as meaning that, if the place of an intra-Community acquisition is deemed, on the basis of the first subparagraph of the latter provision, to be within the territory of the Member State which issued the VAT identification number under which the person acquiring made the acquisition, the aforementioned person acquiring the goods has the right immediately to deduct the VAT thus due in that Member State?'

Case C-539/08

21 Facet, a single taxable unit established in the Netherlands, markets computer parts. In the period from 1 December 2000 to 30 September 2001, it purchased goods of that kind from undertakings in Germany and Italy ('the suppliers') and sold them on to customers who were established in Cyprus ('the customers') and had a tax representative established in Greece. The goods were transferred directly from Germany and Italy to Spain.

22 The suppliers did not include any VAT in the invoices. They did, however, refer on those invoices to Facet's Netherlands VAT identification number. Facet also did not include any VAT in the invoices which it forwarded to its Cypriot customers. However, it referred on those invoices to the Greek identification number notified to it by the customers.

23 In its tax return in the Netherlands, Facet mentioned the VAT due in respect of intra-Community acquisitions and deducted that VAT. It also referred to the supplies to the customers as intra-Community supplies for the purposes of Article 37a of the Law on turnover tax and the final subparagraph of Article 22(6)(b) of the Sixth Directive, referring to the Greek VAT identification numbers of the customers or their tax representatives. However, neither the tax representatives nor the customers themselves filled out declarations of intra-Community acquisitions with respect to the relevant purchases. Nor was any notification given of intra-Community supplies or any 'recapitulative statement', within the meaning of the final subparagraph of Article 22(6)(b) of the Sixth Directive, submitted. Furthermore, the customers were not registered in Spain for VAT purposes and did not fill out any declarations of intra-Community acquisitions in that country.

24 The Inspector took the view that Facet had made intra-Community acquisitions and that it was not entitled to deduct the VAT. In those circumstances, he imposed an additional assessment.

25 Facet appealed to the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) against the Inspector's decision. By judgment of 27 February 2006, that court declared the appeal to be well founded, set aside the contested decision and reduced the amount of the additional assessment. The Staatssecretaris appealed in cassation against that judgment to the Hoge Raad der Nederlanden.

26 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer to the Court a question identical to that referred in Case C-536/08 for a preliminary ruling.

The question referred for a preliminary ruling

27 By its question, the Hoge Raad der Nederlanden asks, in essence, whether a person acquiring goods has, under Article 17(2) and (3) of the Sixth Directive, a right immediately to deduct the input VAT charged on an intra-Community acquisition in the circumstances referred to in the first subparagraph of Article 28b(A)(2) of that directive.

28 In order to answer that question, it is necessary to recall, first of all, that the right to deduct VAT, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT and in principle may not be limited (see Case C-25/07 *Sosnowska* [2008] ECR I-5129, paragraph 15, and Case C-74/08 *PARAT Automotive Cabrio* [2009] ECR I-3459, paragraph 15).

29 The right of deduction must be exercised immediately in respect of all the taxes charged on input transactions. It follows that any limitation on the right of deduction of VAT affects the level of the tax burden and must be applied in a similar manner in all Member States (see *PARAT Automotive Cabrio*, paragraph 16).

30 Article 28b(A) of the Sixth Directive, which forms part of the transitional arrangements for the taxation of trade between Member States as laid down in Title XVIa of that directive, governs the place of intra-Community acquisitions of goods such as those at issue in the main proceedings. The purpose of those transitional arrangements is to transfer the tax revenue to the Member State in which final consumption of the goods supplied takes place (see Case C-245/04 *EMAG Handel Eder* [2006] ECR I-3227, paragraph 40).

31 Article 28b(A)(1) sets out the general rule that the place of an intra-Community acquisition of goods is to be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.

32 It must be pointed out, in that regard, that Directive 92/111 inserted in Article 28b(A)(2) of the Sixth Directive a final subparagraph which provides that if the acquirer establishes that he has effected the intra-Community acquisition for the needs of a supply effected in the Member State referred to in paragraph 1 of that article and for which the consignee has been designated as the person liable for the tax due in accordance with Article 28c(E)(3) of that directive, and if the obligations for declaration set out in the final subparagraph of Article 22(6)(b) of that directive have been satisfied by that acquirer, then, in those circumstances, the intra-Community acquisition is to be deemed to have been subject to VAT in accordance with the general rule set out in Article 28b(A)(1).

33 In order to ensure that the acquisition in question is subject to VAT, the first subparagraph of Article 28b(A)(2) of the Sixth Directive provides that, unless the person acquiring the goods establishes that the transaction has been subject to tax in accordance with paragraph 1 of that article, the place of the acquisition is deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition ('the Member State which issued the identification number').

34 If the acquisition is subject to VAT in accordance with Article 28b(A)(1) of the Sixth Directive in the Member State of arrival of the dispatch or transport of the goods after having been subject to VAT in accordance with the first subparagraph of Article 28b(A)(2), the second subparagraph of Article 28b(A)(2) provides for a corrective mechanism, which consists in reducing the taxable amount accordingly in the Member State which issued the identification number.

35 It follows that Article 28b(A)(2) of the Sixth Directive seeks, first, to ensure that the intra-Community acquisition in question is subject to tax and, secondly, to prevent double taxation in respect of the same acquisition.

36 However, as has been pointed out in paragraph 32 of this judgment, the application of the corrective mechanism provided for in the second subparagraph of Article 28b(A)(2) of the Sixth Directive is subject to the existence of the cumulative conditions set out in the final subparagraph of that article.

37 In that regard, it is important to note, first, that Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1) was not adopted for the purpose of establishing a system for exchanging information between the tax authorities of the Member States allowing them to establish whether intra-Community acquisitions have in fact been subject to VAT in the Member State of arrival of the dispatch or transport in cases where a taxable person is not himself able to provide the necessary evidence for that purpose (see, to that effect, Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 34).

38 Secondly, it must be pointed out that, when the conditions set out in Article 28c(E)(3) of the Sixth Directive are met, each Member State is required to take specific measures to ensure that VAT is not charged on 'intra-Community acquisitions' of goods effected, within the meaning of Article 28b(A)(1) of that directive, within its territory.

39 The question therefore arises whether a taxable person must be allowed a right to immediate deduction in the case where, as referred to in the first subparagraph of Article 28b(A)(2) of the Sixth Directive, having failed to establish that the intra-Community acquisition in question has been subject to VAT in the Member State of arrival of the dispatch or transport, that taxable person is subject to that tax in the Member State which issued the identification number.

40 In that regard, it must be borne in mind, first, that, under Article 17(2)(d) of the Sixth Directive, deduction of the input VAT charged on intermediary goods and services acquired by a taxable person, inter alia within the context of intra-Community

acquisitions, is subject to the condition that the goods and services thus acquired are to be used for the purpose of the taxable person's taxable transactions.

41 However, in circumstances such as those at issue in the main proceedings, it is common ground that the goods which are taxed as intra-Community acquisitions deemed to have been made in the Member State which issued the identification number, in accordance with the first subparagraph of Article 28b(A)(2) of the Sixth Directive, did not actually enter that Member State.

42 In those circumstances, those transactions cannot be regarded as giving rise to a 'right to deduct' within the meaning of Article 17 of the Sixth Directive. Consequently, such intra-Community acquisitions cannot benefit from the general regime of deduction set out in that article.

43 It must be pointed out that the general regime for the deduction of tax, as set out in Article 17 of the Sixth Directive, is not intended to replace, in a situation such as that at issue in the main proceedings, the specific regime referred to in the second subparagraph of Article 28b(A)(2) of that directive, which is based on the mechanism of reducing the taxable amount in order to make it possible to correct the double taxation.

44 Furthermore, the granting of a right to deduct in such a case would risk undermining the effectiveness of the second and third subparagraphs of Article 28b(A)(2) of the Sixth Directive in view of the fact that the taxable person, having had the right to deduct in the Member State which issued the identification number, would no longer have any incentive to establish that the intra-Community acquisition in question had been taxed in the Member State of arrival of the dispatch or transport. Such a solution could ultimately jeopardise the application of the basic rule that, in the case of an intra-Community acquisition, the place of taxation is deemed to be the Member State of arrival of the dispatch or transport, that is to say, the Member State of final consumption, which is the purpose of the transitional arrangements.

45 In view of the foregoing considerations, the answer to the question referred is that Articles 17(2) and (3) and 28b(A)(2) of the Sixth Directive must be interpreted as meaning that a taxable person coming within the situation referred to in the first subparagraph of Article 28b(A)(2) does not have the right immediately to deduct the input VAT charged on an intra-Community acquisition.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are 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:

Articles 17(2) and (3) and 28b(A)(2) 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, must be interpreted as meaning that a taxable person coming within the situation referred to in the first subparagraph of Article 28b(A)(2) does not have the right immediately to deduct the input value added tax charged on an intra-Community acquisition.

[Signatures]