Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 October 2017 *

(Reference for a preliminary ruling — Value added tax (VAT) — Sixth Directive 77/388/EEC — Directive 2006/112/EC — Exemption from VAT — Article 86(1)(b) and Article 144 — Relief from import duties for goods of negligible value or of a non-commercial character — Exemption of the supply of services relating to the importation of goods — National legislation levying VAT on the transport costs of documents and goods of negligible value despite their being ancillary to non-taxable goods)

In Case C-273/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 9 December 2015, received at the Court on 13 May 2016, in the proceedings

Agenzia delle Entrate

v

Federal Express Europe Inc.,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, E. Regan, J.-C. Bonichot, C.G. Fernlund and S. Rodin, Judges,

Advocate General: E. Tanchev,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2017,

after considering the observations submitted on behalf of:

– Federal Express Europe Inc., by G. Brocchieri, G. Di Garbo, G. Polacco and B. Bagnoli, avvocati, and T. Scheer, advocaat,

– the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino and E. De Bonis, avvocati dello Stato,

– the European Commission, by R. Lyal, L. Lozano Palacios and F. Tomat, acting as Agents,

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

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 86(1)(b) and Article 144 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The request has been made in proceedings between the Agenzia delle Entrate (Italian Revenue Authority) and Federal Express Europe Inc. ('FedEx'), an Italian subsidiary of the FedEx Corporation group, concerning the levying of value added tax (VAT) on transport costs connected to the importation of goods exempt from VAT.

Legal context

EU law

Regulation (EEC) No 918/83

3 Article 27 of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1), as amended by Council Regulation (EEC) No 3357/91 of 7 November 1991 (OJ 1991 L 318, p. 3) ('Regulation No 918/83'), is worded as follows:

'Subject to Article 28, any consignments made up of goods of negligible value dispatched direct from a third country to a consignee in the Community shall be admitted free of import duties.

"Goods of negligible value" means goods the intrinsic value of which does not exceed a total of [EUR] 22 per consignment.'

Directive 83/181/EEC

4 Article 22 of Council Directive 83/181/EEC of 28 March 1983 determining the scope of Article 14(1)(d) of Directive 77/388/EEC as regards exemption from value added tax on the final importation of certain goods (OJ 1983 L 105, p. 38), as amended by Council Directive 88/331/EEC of 13 June 1988 (OJ 1988 L 151, p. 79) ('Directive 83/181'), stated:

'Goods of a total value not exceeding [EUR 10] shall be exempt on admission. Member States may grant exemption for imported goods of a total value of more than [EUR 10] but not exceeding [EUR 22].

However, Member States may exclude goods which have been imported on mail order from the exemption provided for in the first sentence of the first subparagraph.'

5 Directive 83/181 was repealed by Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112 as regards exemption from value added tax on the final importation of certain goods (OJ 2009 L 292, p. 5). Article 23 of Directive 2009/132 reproduced, in essence, the content of Article 22 of Directive 83/181.

Directive 2006/79/EC

6 Recitals 2 and 3 of Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries (OJ 2006 L 286, p. 15) state:

'(2) Provision should be made for the exemption from turnover taxes and excise duties of imports of small consignments of goods of a non-commercial character from third countries.

(3) To that end the limits within which such exemption is to be applied should, for practical reasons, be as far as possible the same as those laid down for the Community arrangements for exemption from customs duties in [Regulation No 918/83].'

7 Article 1 of that directive is worded is follows:

'1. Goods in small consignments of a non-commercial character sent from a third country by private persons to other private persons in a Member State shall be exempt on importation from turnover tax and excise duty.

2. For the purposes of paragraph 1, "small consignments of a non-commercial character" shall mean consignments which:

(a) are of an occasional nature;

(b) contain only goods intended for the personal or family use of the consignees, the nature and quantity of which do not indicate that they are being imported for any commercial purpose;

(c) contain goods with a total value not exceeding EUR 45;

(d) are sent by the sender to the consignee without payment of any kind.'

The VAT Directive

8 Article 85 of the VAT Directive, which is in Chapter 4, 'Importation of goods', of Title VII, 'Taxable amount', states:

'In respect of the importation of goods, the taxable amount shall be the value for customs purposes, determined in accordance with the Community provisions in force.'

9 Article 86 of that directive, in the same chapter, provides in paragraph 1:

'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;

(b) incidental expenses, such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the Member State of importation as well as those resulting from transport to another place of destination within the Community, if that other place is known when the chargeable event occurs.'

10 Article 143 of that directive, in Chapter 5, 'Exemptions on importation', of Title IX, 'Exemptions', states:

'Member States shall exempt the following transactions:

(a) the final importation of goods of which the supply by a taxable person would in all circumstances be exempt within their respective territory;

(b) the final importation of goods governed by [Council Directive 69/169/EEC of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969(I), p. 232)], [Directive 83/181] and [Directive 2006/79];

…'

11 Under Article 144 of that directive, in the same chapter:

'Member States shall exempt the supply of services relating to the importation of goods where the value of such services is included in the taxable amount in accordance with Article 86(1)(b).'

12 Article 413 of the directive states:

'This Directive shall enter into force on 1 January 2007.'

Italian law

13 Article 9 of the decreto del Presidente della Repubblica n. 633 — istituzione e disciplina dell'imposta sul valore aggiunto (Decree No 633 of the President of the Republic establishing and regulating value added tax) of 26 October 1972 (GURI No 292 of 11 November 1972), in the version applicable at the time of the facts in the main proceedings ('Decree No 633/72'), provides:

'1. The following are international services or services related to international trade which are not taxable:

…

(2) transport related to goods for export, in transit, or goods imported temporarily, as well as transport related to goods for importation the payments for which are taxable pursuant to Article 69(1) …

…'

14 Article 69(1) of that decree states:

'Tax shall be commensurate, at the tax rates set out in Article 16, to the value of the imported goods as determined pursuant to the provisions on customs, increased by the amount of customs duties due, with the exception of VAT, and by the amounts of the costs for forwarding to the place of destination within the territory of the [European Union] indicated on the transport document under which the goods are imported into that territory. …'

15 According to Article 12(1) of the legge n. 115 — **Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea** — Legge **europea 2014** (Law No 115 on provisions to comply with the obligations arising from Italy's membership of the European Union — European Law 2014) of 29 July 2015 (GURI No 178 of 3 August 2015):

'1. The following subparagraph is inserted after point 4 of Article 9(1) of [Decree No 633/72]:

"4.A The ancillary services relating to small consignments of a non-commercial character and consignments of negligible value to which Directives [2006/79] and [2009/132] refer, …, as long as the payments for ancillary services have contributed to the determination of the taxable amount for the purposes of Article 69 of the present decree and even though that amount has not been subject to tax."'

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

16 Following a tax inspection carried out by the Guardia di Finanza (Italian Finance Police) and the drawing-up of an official report notified on 18 September 2008, four tax assessment notices were issued against FedEx regarding 'inbound' transport services carried out by it, namely receiving international consignments and subsequently delivering them to recipients in Italy.

17 In particular, in the tax assessment notice relating to the 2007 financial year, at issue in the main proceedings, the Revenue Authority found that the VAT should have been increased by EUR 1 913 970 and, furthermore, applied penalties totalling EUR 5167719.01 for the 'failure to invoice taxable transactions' and for the 'under-declaration of tax due'.

18 The Revenue Authority relied on an interpretation of point 2 of Article 9(1) of Decree No 633/72, read in conjunction with Article 69(1) of that decree, pursuant to which the non-applicability of VAT for customs purposes to the importation of small consignments of goods does not preclude the levying of VAT on the payment corresponding to the transport costs relating to those goods, and that the exemption from VAT of those ancillary costs is granted only if those costs have already been subject to VAT at the customs stage.

19 FedEx brought an action before the Commissione tributaria provinciale di Milano (Provincial Tax Court, Milan, Italy) against that tax assessment notice, submitting in particular that the Revenue Authority's interpretation of point 2 of Article 9(1) of Decree No 633/72 was manifestly lacking any foundation in law.

20 By judgment of 27 March 2013, the Commissione tributaria provinciale di Milano (Provincial Tax Court, Milan) upheld the action brought by FedEx.

21 In the meantime, FedEx had lodged a complaint with the European Commission seeking the initiation, pursuant to Article 258 TFEU, of infringement proceedings against the Italian Republic regarding the transport costs of imported goods of negligible value being subject to VAT, which it considered to be contrary to Article 86(1)(b) and Article 144 of the VAT Directive.

22 After the initiation of infringement proceedings on 27 September 2012, the Commission issued a letter of formal notice on 1 October 2012 and a reasoned opinion on 21 November 2013. Since the Italian Republic, following that reasoned opinion, amended Article 9(1) of Decree No 633/72 in the manner set out in paragraph 15 above, the infringement proceedings were closed.

23 The judgment of the Commissione tributaria provinciale di Milano (Provincial Tax Court, Milan) of 27 March 2013 was confirmed by the Commissione tributaria regionale della Lombardia (Regional Tax Court, Lombardy, Italy), which took the view that the Revenue Authority's position was 'manifestly contrary' to Article 144 of the VAT Directive. The Revenue Authority lodged an appeal on a point of law against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation, Italy).

24 In its appeal on a point of law, the Revenue Authority argued that its interpretation of point 2 of Article 9(1) of Decree No 633/72, read in conjunction with Article 69(1) of that decree, is not contrary to the VAT Directive in so far as, first, that directive entered into force only on 1 January 2008 and, accordingly, is not applicable to the dispute in the main proceedings and, second, in any event, the dispute does not fall within the scope of either Article 86 or Article 144 of that directive, since the costs at issue in the main proceedings are not ancillary in nature and were not incurred as a result of an international transport.

25 The referring court expresses doubts as to whether point 2 of Article 9(1) and Article 69(1) of Decree No 633/72 are in conformity with Article 86(1)(b) and Article 144 of the VAT Directive.

26 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Can Article 144 and Article 86(1) of [the VAT Directive] [corresponding to Article 14(1) and (2) and Article 11.B(3) 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)], taken together, be interpreted to mean that the only condition in order for connected services consisting of the "inbound" transport service — from airports to the place of destination within the territory of the Member State, with the "free-at-destination" clause — not to be liable to VAT is that their value is included in the taxable amount, regardless of whether or not the goods in question were in fact subject to customs duties, at the time of their importation; and is it therefore incompatible with those [EU law] provisions if the domestic rules laid down in [point 2 of] Article 9(1) and Article 69(1) of [Decree No 633/72] read together in the versions in force at the time of the material facts, provide that in every case, and therefore also in the case of imports that are not liable to VAT — as is the case here, since it concerns documents and goods of negligible value — there has to be compliance with the additional requirement that those imports must in fact be liable to VAT (and customs duty must in fact be paid) at the time of the importation of such goods, even, if need be, when account is taken of the ancillary nature of the transport services in relation to the main services (namely the importation) and of the rationale of simplification underlying both the main and the ancillary operations? '

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether Article 144 in conjunction with Article 86(1)(b) of the VAT Directive must be interpreted as precluding national legislation such as that at issue in the main proceedings which requires, for the application of an exemption from VAT for ancillary services, including transport services, not only that their value is included in the taxable amount, but also that VAT has in fact been charged on those services at the customs stage at the time of importation.

28 Since the Italian Government argues that the VAT Directive was not in force at the time of the facts in the main proceedings, it is necessary at the outset to establish the legal framework applicable in the present case.

29 In that regard, it is clear from Article 413 of the VAT Directive that it entered into force on 1 January 2007. As regards the time limits for transposition, recital 66 of that directive states that 'the obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives' and that 'the obligation to transpose into national law the provisions which are unchanged arises under the earlier Directives'.

30 Articles 86 and 144 of the VAT Directive correspond to Article 11.B(3) and Article 14(1)(i) of Sixth Directive 77/388 respectively, so that the obligation to transpose stems from the earlier directives. The latter provisions were inserted into Sixth Directive 77/388 by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1), Article 3(1) of which set 1 January 1993 as the deadline for the transposition of those provisions.

31 It follows that, in so far as, in the present case, the question referred concerns a tax adjustment notice issued by the Revenue Authority relating to 2007, the VAT Directive is applicable ratione temporis to the dispute in the main proceedings.

32 The referring court is unsure whether the Italian legislation, by making the application of the exemption from VAT to transport costs subject not only to the inclusion of their value in the taxable amount, but also to VAT actually being charged on them at the customs stage at the time of importation, is compatible with EU law.

33 In particular, the question referred relates to consignments of goods of negligible value or without commercial value, which, first, in accordance with Article 27 of Regulation No 918/83, are exempted from import duties and, second, in accordance with Article 143(b) of the VAT Directive, are exempt from VAT at the time of importation.

34 In that regard, it should be recalled that, under Article 143(b) of the VAT Directive, the Member States are required to exempt from VAT the final importation of goods from third countries governed by Directives 83/181 and 2006/79. Furthermore, according to Article 144 of the VAT Directive, the Member States are required to exempt the supply of services relating to the importation of goods where the value of such services is included in the taxable amount in accordance with Article 86(1)(b) of that directive.

35 As regards the taxable amount relating to the importation of goods, it is clear from Article 85 of the VAT Directive that that amount is formed by the value defined as the value for customs purposes. That value must, in any event, include the factors covered by Article 86(1)(b) of that directive, including, as ancillary costs, transport costs.

36 The Italian legislation in force at the time of the facts in the main proceedings, in particular Article 9 of Decree No 633/72, required, for the exemption from VAT to be applied to ancillary services, not only that their value was included in the taxable amount, but also that VAT was actually charged on them at the customs stage at the time of importation. According to the request for a preliminary ruling, the latter requirement sought to avoid situations of double imposition of VAT.

37 In that regard, it should be recalled that, for VAT purposes, each transaction must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (see, to that effect, judgment of 17 January 2013, *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 29).

38 Nevertheless, it is also clear from the case-law of the Court that, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, separately, to taxation or exemption, must be considered to constitute a single transaction when they are not independent. There is a single supply where two or more elements or acts supplied by the taxable person to the

customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgment of 16 July 2015, *Mapfre asistencia and Mapfre warranty*, C-584/13, EU:C:2015:488, paragraph 50).

39 In that regard, it should be noted that Article 86(1)(b) of the VAT Directive ensures that the taxation of the ancillary service follows the taxation of the primary service. According to Article 144 of that directive, first, the exempted primary service corresponds to that of the importation of goods and, second, the ancillary services are the services listed in Article 86(1)(b) of that directive, which should, as such, follow the tax treatment of the primary service, provided that their value is included in the taxable amount.

40 Accordingly, it follows from a combined reading of Article 86(1)(b) and Article 144 of the VAT Directive that, to the extent that the transport costs are included in the taxable amount of the exempted importation transaction, the supply of ancillary services must also be exempt from VAT.

41 The requirement that that supply of services has in fact been subjected to VAT at the customs stage, as provided for under the legislation at issue in the main proceedings, would negate the effectiveness of the exemption provided for in Article 144 of the VAT Directive, given that such a requirement would have the result that that exemption would never be applicable to the importation of consignments of goods of negligible value or of a non-commercial character, even where they should be exempt from VAT pursuant to Article 143(b) of that directive.

42 It is settled case-law of the Court that the interpretation of the terms used to define the exemptions must be consistent with the objectives pursued by those exemptions, guarantee their effects and comply with the principle of fiscal neutrality (see, to that effect, judgment of 21 March 2013, *PFC Clinic*, C-91/12, EU:C:2013:198, paragraph 23).

43 Lastly, with regard to the objective pursued by the exemption at issue in the main proceedings, the Italian Government argues that that exemption seeks to avoid situations of double taxation, explaining that, in the situation where the transport costs are exempted from VAT for customs purposes, they should be liable to VAT, even if the consideration is included in the taxable amount. FedEx and the Commission take the view, by contrast, that the purpose of the exemption is technical simplification and, therefore, the application of such an exemption is independent of whether the transport costs are subjected to VAT for customs purposes. Consequently, in their view, the transport costs relating to importations are exempt from VAT on the basis of Article 144 of the VAT Directive, in so far as their value is included in the taxable amount.

44 The Court has already acknowledged, as regards relief from import duty of goods of negligible value, that such relief aims at administrative simplification of customs procedures (see, to that effect, judgment of 2 July 2009, *Har Vaessen Douane Service*, C-7/08, EU:C:2009:417, paragraph 33).

45 Since the exemption provided for under Article 144 of the VAT Directive relates to the same goods as those which enjoy such relief, it is necessary to apply that line of case-law to that article too. Accordingly, it may be concluded that the purpose of that exemption is not to avoid situations of double taxation but, in a purely technical sense, to simplify the application of tax.

46 It follows that transport costs related to the final importation of goods must be exempt from VAT, provided that their value is included in the taxable amount, even though they were not subjected to VAT at the customs stage at the time of importation.

47 Having regard to those considerations, the answer to the question referred is that Article 144 in conjunction with Article 86(1)(b) of the VAT Directive must be interpreted as precluding national legislation such as that at issue in the main proceedings which requires, for the application of an

exemption from VAT for ancillary services, including transport services, not only that their value is included in the taxable amount, but also that VAT has in fact been charged on those services at the customs stage at the time of importation.

Costs

48 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:

Article 144 in conjunction with Article 86(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation such as that at issue in the main proceedings which requires, for the application of an exemption from value added tax for ancillary services, including transport services, not only that their value is included in the taxable amount, but also that value added tax has in fact been charged on those services at the customs stage at the time of importation.

[Signatures]