

JUDGMENT OF THE COURT (Second Chamber)

10 November 2011 *

In Case C-444/10,

REFERENCE for a preliminary ruling under 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 14 July 2010, received at the Court on 15 September 2010, in the proceedings

Finanzamt Lüdenscheid

v

Christel Schriever,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Löhmus (Rapporteur), A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Finanzamt Lüdenscheid, by H. Selle, acting as Agent,
- the European Commission, by L. Lozano Palacios and B.-R. Killmann, acting as Agents,

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

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 5(8) 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’).

- 2 The reference has been made in appeal proceedings between the Finanzamt Lüdenscheid (Lüdenscheid Tax Office; ‘the Finanzamt’) and Ms Schriever regarding an adjusted tax assessment notice by which the Finanzamt categorised the transfer by Ms Schriever of the stock and fittings of a shop as a transaction subject to valued added tax (‘VAT’).

Legal context

The Sixth Directive

- 3 Under Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to VAT.
- 4 Under Article 5(1) of that directive, ‘supply of goods’ means the transfer of the right to dispose of tangible property as owner.
- 5 Under Article 5(8) of the Sixth Directive:

‘In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the

successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.’

- 6 Under Article 6(5) of the Sixth Directive, Article 5(8) is to apply ‘in like manner to the supply of services’.

National law

- 7 Under the first sentence of point (1) of Paragraph 1(1) of the German Law on Turn-over Tax 1993 (Umsatzsteuergesetz 1993, BGBl. 1993 I, p. 565; ‘the UStG’), supplies of goods and services effected by a trader within German territory for consideration in the course of his business are subject to VAT.
- 8 Paragraph 1(1a) UStG, designed to transpose Articles 5(8) and 6(5) of the Sixth Directive into national law, provides:

‘Transactions in the context of the transfer of a business to another trader for the purposes of his undertaking are not subject to [VAT]. A transfer of a business takes place where an undertaking or separately managed business unit forming part of an undertaking is, whether for consideration or not, in its entirety transferred or brought in as a contribution to a company. The recipient trader takes the place of the transferor.’

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

- 9 Until 30 June 1996, Ms Schriever ran a retail business, selling sports equipment from premises belonging to her. With effect from that date, she transferred the stock and fittings of the shop to Sport S. GmbH ('Sport S.') for a total of DEM 455 000, with no mention of VAT on the related invoice.
- 10 At the same time, Ms Schriever leased the premises where the business was carried on to Sport S. from 1 August 1996 for an indefinite period. However, under the terms of the lease contract, the lease could be terminated by either party at the latest on the third working day of any calendar quarter, to take effect at the end of the following calendar quarter.
- 11 Sport S. ran the sports shop until 31 May 1998.
- 12 Ms Schriever treated the transfer of the stock and fittings as a non-taxable transfer of a business in its entirety, in accordance with Paragraph 1(1a) UStG. Consequently, she did not declare the proceeds of that sale on her 1996 VAT return.
- 13 The Finanzamt, however, took the view that the conditions for a transfer of a business in its entirety were not satisfied because the business premises, which constituted an essential component element of the business, were not among the items sold to Sport S. In the adjusted 1996 VAT assessment notice, the Finanzamt treated the transaction as taxable and determined the VAT due accordingly.

- ¹⁴ The Finanzgericht, upholding the action brought by Ms Schriever contesting the decision of the Finanzamt, found that, having regard to all the circumstances of the case, the transaction at issue was indeed a transfer of a business in its entirety for the purposes of Paragraph 1(1a) UStG, since Sport S. effectively continued Ms Schriever's business activities, and the mere theoretical possibility that the lease contract could be terminated at any time had no bearing in that regard.
- ¹⁵ The Finanzamt brought an appeal on a point of law against that judgment before the Bundesfinanzhof, submitting that, since it is not possible to operate a retail business without shop premises, a lease contract which operates on the basis of a statutory termination period cannot ensure the continuation of the business.
- ¹⁶ In the order for reference, the Bundesfinanzhof recalls that, according to its settled case-law, a transfer can be categorised as a transfer of a business notwithstanding the fact that some essential individual component elements of the business are not transferred together with the business, provided, however, that the transferee is able to make long-term use of those elements, in order to carry on the business on a lasting basis. The Bundesfinanzhof observes that it has found a 10-year lease to be sufficient for a long-term transfer of use of such important component elements, while the Finanzgericht Baden-Württemberg has held, in a judgment which has become final, that a lease of premises owned by a transferor for a five-year period was insufficient to support a finding that the business activity was being continued.
- ¹⁷ According to the Bundesfinanzhof, however, the circumstances of the case before it are special, in that the lease for an indefinite period could be terminated by either party at short notice.

- 18 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Is there a “transfer” of a totality of assets within the meaning of the Sixth Directive in the case where a trader transfers the stock and fittings of his retail outlet to a purchaser and merely leases the premises which he owns to the purchaser?
- (2) Is it relevant in that regard whether the premises were leased on the basis of a long-term contract of lease for use or whether the lease contract is concluded for an indefinite period and may be terminated by either party at short notice?’

Consideration of the questions referred

- 19 By its questions, which should be examined together, the referring court essentially asks whether Article 5(8) of the Sixth Directive must be interpreted as meaning that there is a ‘transfer of a totality of assets or a part thereof’ where the stock and fittings of a retail outlet are transferred concomitantly with the conclusion of a contract of lease, to the transferee, of the business premises for an indefinite period but terminable at short notice by either party.
- 20 First of all, it should be observed that the first sentence of Article 5(8) of the Sixth Directive provides that Member States may, in the event of a transfer of a totality of assets or part thereof, consider that no supply of goods has taken place and that the recipient is the successor to the transferor. It follows that, where a Member State has

exercised that option, the transfer of a totality of assets or part thereof is not regarded as a supply of goods for the purposes of the Sixth Directive and, accordingly, is not subject to VAT under Article 2 of that directive (see, to that effect, Case C-408/98 *Abbey National* [2001] ECR I-1361, paragraph 30; Case C-497/01 *Zita Modes* [2003] ECR I-14393, paragraph 29; and Case C-29/08 *SFK* [2009] ECR I-10413, paragraph 36).

- 21 Under the second sentence of Article 5(8) of the Sixth Directive, Member States may exclude from the application of the no-supply rule transfers of a totality of assets in favour of a recipient who is not a taxable person within the meaning of that directive or who acts as a taxable person only in relation to some of his activities, if this is necessary to prevent distortion of competition. That provision must be regarded as exhaustive in relation to the conditions under which a Member State which makes use of the option provided for in the first sentence of Article 5(8) may limit the application of the no-supply rule (*Zita Modes*, paragraph 30).
- 22 Next, regarding the concept of a ‘transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof’, referred to in the first sentence of Article 5(8) of the Sixth Directive, the Court has observed that this constitutes an independent concept of EU law which must be given a uniform interpretation throughout the European Union. There being no definition of that concept in the Sixth Directive, and no express reference to the law of the Member States, its meaning and scope must be identified in the light of the context of the provision and the purpose of the legislation in question (see, to that effect, *Zita Modes*, paragraphs 32 to 35).
- 23 It is precisely in the light of the context of Article 5(8) of the Sixth Directive and the purpose of that directive that the Court has held that that provision is intended to enable the Member States to facilitate transfers of undertakings or of parts of

undertakings by making such transfers simpler and by preventing the resources of the recipient from being overburdened by a disproportionate charge to tax which, in any event, would ultimately be recovered through deduction of the input VAT paid (*Zita Modes*, paragraph 39).

- ²⁴ The Court has also held that, in view of that purpose, the concept of a ‘transfer ... of a totality of assets or part thereof’ must be interpreted as covering the transfer of a business or of an independent part of an undertaking, including tangible elements and, as the case may be, intangible elements, which, together, constitute an undertaking or a part of an undertaking which is capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of goods (see *Zita Modes*, paragraph 40, and *SKF*, paragraph 37).
- ²⁵ It follows that, in order to find that there has been a transfer of a business, or of an independent part of an undertaking, for the purposes of Article 5(8) of the Sixth Directive, all of the elements transferred must, together, be sufficient to allow an independent economic activity to be carried on.
- ²⁶ The question whether there must be both movable and immovable assets among those elements must be assessed in the light of the nature of the economic activity at issue.
- ²⁷ Where an economic activity does not require the use of particular premises or of premises equipped with fixtures necessary for the pursuit of the economic activity, there may be a transfer of a totality of assets for the purposes of Article 5(8) of the Sixth Directive even without the transfer of property in an immovable asset.

- ²⁸ However, where the very nature of the economic activity entails the use of an inseparable bundle of movable and immovable property, such a transfer cannot be considered to have occurred if the transferee has not taken possession of the business premises. In particular, if the business premises are equipped with fixtures necessary for the pursuit of the economic activity, these immovable items must form part of the elements transferred in order for the transaction to qualify as the transfer of a totality of assets, or of a part thereof, for the purposes of the Sixth Directive.
- ²⁹ Equally, a transfer of assets may also take place if the business premises are made available to the transferee by means of a lease contract, or if the transferee itself has appropriate premises to which all of the goods transferred can be moved and where the transferee may continue to carry on the economic activity concerned.
- ³⁰ Any other interpretation would lead to an arbitrary distinction between, on the one hand, transfers made by transferors who also own the premises accommodating the business, or the part of the undertaking, which they intend to transfer and, on the other, those made by transferors who hold those premises under a lease. Neither the wording nor the purpose of Article 5(8) of the Sixth Directive suggests that transferors in the latter class are unable to transfer a totality of assets for the purposes of that provision.
- ³¹ Moreover, the amount of VAT to be paid on the transfer of a business or a part thereof is likely to constitute a particularly heavy burden on the transferee in relation to the resources of the business concerned, even where the totality of assets transferred includes no immovable property. It is therefore consistent with the purpose of Article 5(8) of the Sixth Directive, as described in paragraph 23 above, also to accord special treatment to transfers of a totality of assets concomitant with the conclusion

of a contract for lease of the business premises (see, to that effect, *Zita Modes*, paragraph 41).

- 32 It follows from the foregoing considerations that an overall assessment must be made of the factual circumstances of the transaction at issue in order to determine whether it is covered by the concept of the transfer of a totality of assets for the purposes of the Sixth Directive. In that context, particular importance must be attached to the nature of the economic activity which it is sought to continue.
- 33 As regards, in particular, the transfer of the stock and fittings of a retail outlet, this is generally effected in order to enable the transferee to continue running that outlet.
- 34 Even if the economic activity at issue is one which cannot be carried out without business premises, it is not necessary, as a general rule, in order to ensure the continuation of the retail business transferred, for the owner of that business also to be the owner of the building within which it is operated.
- 35 To the extent that the transfer of the stock and fittings of the outlet is sufficient to allow the continuation of an independent economic activity, the question whether the transaction is to be categorised as a transfer of a totality of assets does not turn on whether or not immovable property has been transferred.
- 36 Furthermore, where the continuation of the economic activity in question requires that the transferee use the same premises as were used by the transferor, there is no reason in principle why possession of those premises may not be transferred by means of a lease contract.

- 37 It is also necessary, in order for Article 5(8) of the Sixth Directive to apply, for the transferee to intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any (see, to that effect, *Zita Modes*, paragraph 44).
- 38 In that regard, it follows from the Court's case-law that the intentions of the purchaser can – or, in certain cases, must – be taken into account in the course of an overall assessment of the circumstances of a transaction, provided that they are supported by objective evidence (see, to that effect, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 24; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 47; and Case C-84/09 *X* [2010] ECR I-11645, paragraphs 47 and 51).
- 39 It emerges from the file submitted to the Court that, in the case before the referring court, the transfer of the stock and fittings of the sports equipment retailer concomitant with the conclusion of a contract of lease of the business premises did indeed allow the purchaser to continue the independent economic activity previously carried on by the seller. In that connection, it is common ground that the transfer cannot be regarded as a mere sale of stock: both the stock and the fittings of the business formed part of the assets transferred. Furthermore, the fact that the transferee continued to operate the sports shop for nearly two years confirms that its intention was not to liquidate the activity concerned immediately.
- 40 Accordingly, in the case before the referring court, the fact that the business premises were only leased, and not sold, to the purchaser, did not constitute an obstacle to the continuation of the seller's activity by that purchaser.

- 41 Finally, the referring court asks whether the duration of the lease and the procedure for terminating it are to be taken into account when assessing whether the transfer of a business or a part of an undertaking can be categorised as a transfer of a totality of assets for the purposes of Article 5(8) of the Sixth Directive.
- 42 In that regard, it should be observed that matters such as the duration of the lease granted and the procedure agreed for terminating it must be taken into account in an overall assessment of the transaction transferring the assets, for the purposes of Article 5(8) of the Sixth Directive, given that they may have a bearing on that assessment if they might make it impossible to carry on the economic activity on a lasting basis.
- 43 However, the possibility of terminating a lease contract of indefinite duration by giving short term notice does not of itself decisively support the inference that the transferee intended immediately to liquidate the business, or the part of the undertaking, transferred. Accordingly, application of Article 5(8) of the Sixth Directive cannot be refused on that ground alone.
- 44 That interpretation is consistent with the principle of fiscal neutrality inherent in the common system of VAT. That principle precludes, inter alia, economic operators carrying out the same transactions from being treated differently in relation to the levying of that tax (see, inter alia, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20, and Case C-540/09 *Skandinaviska Enskilda Banken* [2011] ECR I-1509, paragraph 36). It follows that that principle would not be respected if the possibility of applying Article 5(8) of the Sixth Directive to the transfer of a totality of assets, such as that at issue in the main proceedings, depended on the terms of the lease contract, and in particular on its duration and the procedure for terminating it.

- ⁴⁵ In the light of all the foregoing, the answer to the questions referred is that Article 5(8) of the Sixth Directive must be interpreted as meaning that there is a transfer of a totality of assets, or a part thereof, for the purposes of that provision, where the stock and fittings of a retail outlet are transferred concomitantly with the conclusion of a contract of lease, to the transferee, of the premises of that outlet for an indefinite period but terminable at short notice by either party, provided that the assets transferred are sufficient for the transferee to be able to carry on an independent economic activity on a lasting basis.

Costs

- ⁴⁶ 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 (Second Chamber) hereby rules:

Article 5(8) 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 must be interpreted as meaning that there is a transfer of a totality of assets, or a part thereof, for the purposes of that provision, where the stock and fittings of a retail outlet are transferred concomitantly with the conclusion of a contract of lease, to the

transferee, of the premises of that outlet for an indefinite period but terminable at short notice by either party, provided that the assets transferred are sufficient for the transferee to be able to carry on an independent economic activity on a lasting basis.

[Signatures]