

JUDGMENT OF THE COURT (Sixth Chamber)

5 April 2001 *

In Case C-325/99,

REFERENCE to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

G. Van de Water

and

Staatssecretaris van Financiën,

on the interpretation of Article 6(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, J.-P. Puissechot,
R. Schintgen, F. Macken (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Commission of the European Communities, by E. Traversa and
H.M.H. Speyart, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 November
2000,

gives the following

Judgment

- 1 By judgment of 24 August 1999, received at the Court on 31 August 1999, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred for a preliminary ruling under Article 234 EC a question concerning the interpretation of Article 6(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46, hereinafter 'the Directive').
- 2 That question has arisen in proceedings between Mr Van de Water and the Staatssecretaris van Financiën (Netherlands Secretary of State for Finance) concerning an additional assessment to excise duty.

The Community legal framework

- 3 The Directive is designed to establish the rules governing the general arrangements for products subject to excise duty and the holding, movement and monitoring of such products, which the Member States have been required to implement since 1 January 1993.
- 4 According to the fourth recital in the preamble to the Directive, in order to ensure the establishment and functioning of the internal market, the chargeability of excise duties should be identical in all the Member States.

5 The ninth recital in the preamble to the Directive states that, in order to ensure that the tax debt is eventually collected, it should be possible for checks to be carried out in production and storage facilities and that a system of warehouses, subject to authorisation by the competent authorities, should make it possible to carry out such checks.

6 Article 3(1) of the Directive provides:

‘This Directive shall apply at Community level to the following products as defined in the relevant Directives:

...

— alcohol and alcoholic beverages,

...’

7 According to Article 4(b) of the Directive, the term ‘tax warehouse’ means a place where goods subject to excise duty are produced, processed, held, received or dispatched under duty-suspension arrangements by an authorised warehouse-keeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located. Article 4(c) provides that the term ‘suspension arrangement’ is to mean a tax

arrangement applied to the production, processing, holding and movement of products, excise duty being suspended.

- 8 Under Article 5(1) of the Directive, the products referred to in Article 3(1) are to be subject to excise duty at the time of their production within the territory of the Community or of their importation into that territory.

- 9 Article 6 provides:

‘1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

- (a) any departure, including irregular departure, from a suspension arrangement;
- (b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;

- (c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.’

- 10 According to Article 9(1) of the Directive, excise duty is to become chargeable where products for consumption in a Member State are held for commercial purposes in another Member State, without prejudice to Articles 6 to 8. In that case, the duty is due in the Member State in whose territory the products are and becomes chargeable to the holder of the products.
- 11 Article 11(1) of the Directive provides that each Member State is to determine its rules concerning the production, processing and holding of products subject to excise duty, subject to the provisions of the Directive. According to Article 11(2), the production, processing and holding of products subject to excise duty, where the latter has not been paid, must take place in a tax warehouse.
- 12 Under Article 12 of the Directive, the opening and operation of tax warehouses is subject to authorisation from the competent authorities of the Member States.

- 13 Article 15(1) of the Directive provides that, without prejudice to Articles 5(2), 16, 19(4) and 23(1a), the movement of products subject to excise duty under suspension arrangements must take place between tax warehouses.

The national legal framework

- 14 The Netherlands rules on excise duty are contained in the *Wet op de accijns* (Law

on excise duties) of 31 October 1991 (Stbl. 1991, p. 561), which entered into force on 1 January 1992. In order to transpose the Directive into the Netherlands legal order, that law was amended by a law of 24 December 1992 (Stbl. 1992, p. 711), which entered into force on 1 January 1993.

- 15 Article 1(1) of the *Wet op de accijns*, as amended by the Law of 24 December 1992 (hereinafter 'the Law') provides that products subject to excise duty are to include wine, beer, intermediate products and other alcoholic products. Under Article 1(2), the excise duty becomes chargeable on the release for consumption and importation of the products subject to excise duty.
- 16 Article 2f of the Law provides that the manufacture, in breach of Article 5 of the Law, of products subject to excise duty, and the holding of such products on which duty has not been levied pursuant to the Law, is to be treated as a release for consumption.

- 17 According to Article 51a(f) of the Law, the excise duty chargeable under Article 2f is payable by persons manufacturing or holding products subject thereto.

The dispute in the main proceedings

- 18 Mr Van de Water acquired from a third party, Mr Leemhuis, at least 2 000 litres of pure alcohol having a content of 96.2 per cent by volume, which he used in order to manufacture gin with the help of others in a rented shed in Barendrecht (Netherlands).
- 19 On 8 September 1995, the competent authorities carried out a search in that shed in the presence of the party concerned, in the course of which they found vats containing pure alcohol having a content of 96.2 per cent by volume and jerry cans and bottles filled with gin.
- 20 According to the judgment of the national court, none of the products subject to excise duty which were thus found to be held by Mr Van de Water were covered by customs documents, and the shed was not authorised for use as a tax warehouse.

- 21 Mr Van de Water therefore received an additional assessment demanding payment of excise duty totalling NLG 249 369 in respect of the manufacture of the gin contained in the jerry cans and bottles and NLG 50 543 in respect of the alcoholic products contained in the vats.
- 22 Mr Van de Water thereupon brought proceedings before the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) (Netherlands). According to the judgment making the reference, that court found that Mr Van de Water had infringed Article 5 of the Law by manufacturing and holding goods subject to excise duty on which that duty had not been charged pursuant to the Law in question. Having regard, in particular, to Articles 2f and 51a of the Law, the Gerechtshof held that the additional assessment had been correctly addressed to the person concerned and therefore dismissed his action on the ground that he had not produced any evidence showing that the excise duty had been paid.
- 23 Mr Van de Water then brought an appeal in cassation before the Hoge Raad der Nederlanden, which took the view that the Gerechtshof had been correct in finding that he had manufactured gin subject to excise duty pursuant to Article 2f of the Law, and that the relevant provisions of the Law were in conformity with point (b) of the second subparagraph of Article 6(1) of the Directive.
- 24 As regards the pure alcohol held by Mr Van de Water in the vats, it is apparent from the judgment making the reference that the Hoge Raad inclines to the view that the mere holding of a product subject to excise duty, without that duty having been paid in accordance with the provisions of the Law, cannot be regarded as a release for consumption within the meaning of Article 6(1) of the Directive.

The question referred for a preliminary ruling

- 25 The Hoge Raad der Nederlanden considered in those circumstances that an interpretation of Article 6(1) of the Directive was necessary in order for the dispute to be determined, and therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Can the mere holding of a product subject to excise duty within the meaning of Article 3(1) of the Directive be regarded as a release for consumption within the meaning of Article 6(1) of that directive, if and in so far as duty has not already been levied on it pursuant to the applicable provisions of Community law and national legislation?’

- 26 By that question, the national court is in essence asking whether Article 6(1) of the Directive is to be interpreted as meaning that the mere holding of a product subject to excise duty within the meaning of Article 3(1) of the Directive constitutes a release for consumption where that duty has not yet been levied on the product concerned in accordance with the applicable provisions of Community law and national legislation.

- 27 The Netherlands Government argues that point (a) of the second subparagraph of Article 6(1) of the Directive treats any form of departure, including irregular departure, from a suspension arrangement as a release for consumption. Excise duty is chargeable on any product subject to such duty which departs from a suspension arrangement. Consequently, in the submission of the Netherlands Government, the holding outside a tax warehouse of products subject to excise duty on which that duty has not yet been levied must be regarded as a release for

consumption within the meaning of that provision of the Directive. Once it is established that products which are subject to excise duty but on which that duty has not been paid are located outside a tax warehouse, the mere holding of those products is enough to justify the levying of the duty.

- 28 The Commission, for its part, observes that Article 6(1) of the Directive is designed to establish the point in time at which the excise duty becomes actually chargeable, and not to determine the person from whom the duty should be claimed. According to the Commission, where a product subject to excise duty on which that duty has not been levied is located outside the closed circle of tax warehouses, and thus outside a suspension arrangement, it necessarily follows that that product must at some point have been manufactured or imported outside such an arrangement or have departed irregularly from such an arrangement. Once it is established that duty is chargeable, it is for the Member States to determine, in accordance with Article 6(2) of the Directive, how the duty is to be levied and, in particular, from whom it is to be claimed.
- 29 It must be noted, first, that, according to Article 5(1) of the Directive, products subject to excise duty become taxable under its provisions upon their being produced within the territory of the Community or imported into that territory.
- 30 Second, it is clear from Article 6(1) of the Directive that the chargeability to excise duty of products subject to such duty results, *inter alia*, from their release for consumption as defined by that provision.
- 31 As a general rule, a certain period of time elapses between the occurrence of the taxable event and the point at which the excise duty becomes chargeable. It is precisely during that period that the suspension arrangement defined in Article 4(c) of the Directive is applicable.

- 32 As has been observed in paragraph 20 of this judgment, the national court has indicated that, in the main proceedings, none of the products subject to excise duty which were held by Mr Van de Water was covered by customs documents and that the shed rented by him was not authorised for use as a tax warehouse.
- 33 According to the provisions of the Directive, in particular Articles 11(2) and 12, the production, processing and holding of products subject to excise duty, where that duty has not been paid, must take place in a tax warehouse duly authorised by the Member State within whose territory it is located.
- 34 As the Netherlands Government and the Commission have pointed out, it is clear, first, from the scheme of the Directive and, second, from its provisions concerning the definition and operation of tax warehouses and suspension arrangements, such as Articles 4(b) and (c), 11(2), 12 and 15(1), that a product subject to excise duty which is held outside a suspension arrangement must at some point and in some way have been released for consumption within the meaning of Article 6(1).
- 35 Article 6(1) of the Directive in fact provides that the term ‘release for consumption’ covers not only any manufacture or importation of products subject to excise duty outside a suspension arrangement but also any departure, including irregular departure, from such an arrangement. By placing such a ‘departure’ on the same footing as a release for consumption within the meaning of Article 6(1), the Community legislature has clearly indicated that any production, processing, holding or circulation outside a suspension arrangement gives rise to the chargeability of the excise duty.
- 36 In those circumstances, once it is established before the national court that such a product has departed from a suspension arrangement without the excise duty

having been paid, it is clear that the holding of the product in question constitutes a release for consumption within the meaning of Article 6(1) of the Directive and that the duty has become chargeable.

- 37 It remains to be determined, therefore, the person who is liable to pay the excise duty which has thus become chargeable.
- 38 In that regard, it should be noted that the object of Article 6(1) of the Directive is simply to determine the point in time at which the excise duty becomes chargeable. It is clear from the provisions of Article 6(2) that, once the duty has become chargeable on account of the release of the product for consumption within the meaning of Article 6(1), it is to be levied and collected in accordance with the procedure laid down by each Member State, subject to the proviso that Member States must apply the same levying and collection procedures to national products and to those from other Member States.
- 39 As was noted in paragraph 22 of the judgment in Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, the purpose of the Directive is to lay down various rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties is identical in all the Member States.
- 40 However, by ensuring, in Article 6(1) of the Directive, that the rules governing the chargeability of excise duty are the same in all the Member States, the Community legislature was clearly not seeking to harmonise the procedures for the levying and collection of duty by those States. On the contrary, in Article 6(2),

it expressly left it to the Member States to determine those procedures, subject to the non-discrimination requirement referred to in paragraph 38 of this judgment.

- 41 Lastly, it should be noted that, whilst Article 6 of the Directive does not specify the person liable to pay the duty chargeable, it follows from the scheme of the Directive, and from the ninth recital in its preamble, that the national authorities must in any event ensure that the tax debt is in fact collected.
- 42 It follows from the foregoing that Article 6(1) of the Directive must be interpreted as meaning that the mere holding of a product subject to excise duty within the meaning of Article 3(1) of the Directive constitutes a release for consumption where duty has not yet been levied on that product pursuant to the applicable provisions of Community law and national legislation.

Costs

- 43 The costs incurred by the Netherlands Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Hoge Raad der Nederlanden by judgment of 24 August 1999, hereby rules:

Article 6(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 94/74/EC of 22 December 1994, must be interpreted as meaning that the mere holding of a product subject to excise duty within the meaning of Article 3(1) of that directive constitutes a release for consumption where duty has not yet been levied on that product pursuant to the applicable provisions of Community law and national legislation.

Gulmann

Puissochet

Schintgen

Macken

Cunha Rodrigues

Delivered in open court in Luxembourg on 5 April 2001.

R. Grass

C. Gulmann

Registrar

President of the Sixth Chamber