JUDGMENT OF THE COURT (First Chamber)

7 June 2007 *

In Case C-335/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Finanzgericht Köln (Germany), made by decision of 24 August 2005, received at the Court on 15 September 2005, in the proceedings

Řízení Letového Provozu ČR, s.p.

v

Bundesamt für Finanzen,

THE COURT (First Chamber),

composed of P. Jann, President of Chamber, R. Schintgen (Rapporteur), A. Tizzano, M. Ilešič and E. Levits, Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after considering the written observations submitted on behalf of:

— the Cypriot Government, by E. Simeonidou, acting as Agent,

— the Polish Government, by J. Pietras, acting as Agent,

— the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2(2) of Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ 1986 L 326, p. 40; 'the thirteenth directive').

2 The reference was submitted in the context of proceedings brought by Řízení Letového Provozu ČR, s.p. ('ŘLP'), a company incorporated under Czech law, against the Bundesamt für Finanzen (Federal Finance Office), which is responsible in Germany for the collection of value added tax ('VAT'), regarding the refund of VAT paid by ŘLP in Germany.

Legal framework

International agreements

3 By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), the Council of the European Union approved the Agreement establishing the World Trade Organisation as well as the agreements contained in Annexes 1, 2 and 3 to that Agreement, one of which is the General Agreement on Trade in Services ('the GATS').

4 Article II(1) of the GATS provides:

'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.'

Community legislation

5 The second recital in the preamble to the thirteenth directive reads as follows:

'Whereas there is a need to ensure the harmonious development of trade relations between the Community and third countries based on the provisions of Directive 79/1072/EEC, while taking account of the varying situations encountered in third countries'.

6 Article 2 of the thirteenth directive provides:

'1. Without prejudice to Articles 3 and 4, each Member State shall refund to any taxable person not established in the territory of the Community, subject to the conditions set out below, any [VAT] charged in respect of services rendered or moveable property supplied to him in the territory [of] the country by other taxable persons or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC or of the provision of services referred to in point 1(b) of Article 1 of this Directive.

2. Member States may make the refunds referred to in paragraph 1 conditional upon the granting by third States of comparable advantages regarding turnover taxes.

3. Member States may require the appointment of a tax representative.'

National legislation

7 The sixth sentence of Paragraph 18(9) of the Umsatzsteuergesetz 1999 (German Law of 1999 on turnover tax; 'the UStG') reads as follows:

'A trader not established in the territory of the Community shall be credited with input tax only if in the country in which the trader has his place of business no turnover tax or similar tax is levied or, if levied, only if it is credited to undertakings established in [German territory].'

The main proceedings and the question for preliminary ruling

8 ŘLP, which is established in the Czech Republic, is an undertaking providing services which is active in the flight security sector. Even though its activities are restricted to the territory of the Czech Republic, it is not only Czech citizens who are the recipients but equally also German citizens. Furthermore, ŘLP offers flying instruction sessions in the Czech Republic. For those purposes, however, it had recourse to flight simulator training and to other training courses provided in Germany. Following the imposition of VAT on the supply of those services in Germany, ŘLP applied for a refund of this tax in respect of the year 2002.

9 The Bundesamt für Finanzen rejected that application on the ground that the conditions for application of the sixth sentence of Paragraph 18(9) of the UStG — and more particularly the reciprocity requirement — were not met in this case.

10 Since the objection raised against that decision was also rejected, ŘLP brought an action before the Finanzgericht Köln.

11 The national court notes that, during the relevant period, the Czech Republic levied a turnover tax but provided neither for the deduction of input tax paid nor for the refund of such tax to foreign traders. The national court therefore asks itself whether the applicant in the main proceedings should not have been exempted from that tax in the light of Article II(1) of the GATS. In this regard, it observes that the GATS is an agreement governed by international law which creates rights and obligations only as between its members. If an obligation deriving from the GATS is infringed, the agreement governing the settlement of disputes concluded in the framework of the World Trade Organisation is exclusively applicable.

12 However, an agreement such as the GATS is binding on the institutions of the Community and on the Member States, in accordance with Article 300(7) EC, and forms an integral part of the Community legal order. Secondary Community law must therefore be interpreted in the light of that agreement and in particular of the most-favoured-nation clause contained in Article II(1).

13 Since it considers that the decision in the main proceedings depends upon the compatibility of the UStG with Article 2(2) of the thirteenth directive, and given its doubts concerning the precise interpretation of that provision in the light of the GATS, the Finanzgericht Köln decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 2(2) of the thirteenth directive ... to be interpreted restrictively as meaning that the possibility thereby afforded the Member States of making refunds of value added tax conditional on the granting by third States of comparable advantages

regarding turnover taxes does not apply in the case of States which, as contracting parties [to the GATS] (BGBl. II 1994, p. 1473, ...), may invoke the most-favoured-nation clause contained in that agreement (Art. II(1) GATS)?'

The question referred for a preliminary ruling

14 By its question, the national court seeks essentially to ascertain whether Article 2(2) of the thirteenth directive must be interpreted as meaning that the 'third States' referred to therein include the third States which may invoke the most-favoured-nation clause contained in Article II(1) of the GATS.

15 In this respect, it must be admitted that, as observed by the Advocate General in point 59 of his Opinion, Article 2(2) of the thirteenth directive — in common with all the other provisions of that directive — clearly refers to all third States without any distinction.

16 As regards the influence which an international agreement to which the Community is party, such as the GATS, is capable of having on a provision of secondary law, it is settled case-law that the primacy of international agreements concluded by the Community over secondary Community legislation requires that the latter be interpreted, in so far as is possible, in conformity with those agreements (Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25; and Joined Cases C-447/05 and C-448/05 *Thomson and Vestel France* [2007] ECR I-2049, paragraph 30).

17 In the present case, however, it is sufficient to note that Article 2(2) of the thirteenth directive, in so far as it provides that Member States may make the refunds referred to in Article 2(1) conditional upon the granting by third States of comparable advantages, does not impose any obligation on Member States but merely allows them an option, without preventing them in any respect from complying with the obligations into which they may have entered under an international agreement such as the GATS.

18 In fact, in so far as it leaves each Member State free to decide in respect of each third State whether it would be appropriate or not to impose a condition of reciprocity, Article 2(2) of the thirteenth directive enables Member States, to the extent to which they enter into agreements with certain third States which limit that discretion, to adapt their legislation so as to reflect those agreements.

19 In those circumstances, the obligation to interpret secondary Community law, in so far as is possible, in conformity with international agreements concluded by the Community, does not require the expression 'third States' in Article 2(2) of the thirteenth directive to be interpreted restrictively so as to apply only to third States which cannot invoke the most-favoured-nation clause contained in Article II(1) of the GATS.

20 At the same time, however, Article 2(2) of the thirteenth directive is without prejudice to the ability and the responsibility of the Member States to comply with their obligations under international agreements such as the GATS.

21 Regard being had to all of the foregoing, it should be stated in reply to the question referred that Article 2(2) of the thirteenth directive must be interpreted as meaning that the 'third States' referred to in that provision include all third States and that that provision is without prejudice to the ability and the responsibility of the Member States to comply with their obligations under international agreements such as the GATS.

Costs

22 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 2(2) of Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory must be interpreted as meaning that the 'third States' referred to in that provision include all third States and that that provision is without prejudice to the ability and the responsibility of the Member States to comply with their obligations under international agreements such as the General Agreement on Trade in Services.

[Signatures]