JUDGMENT OF THE COURT (Third Chamber)

27 September 2007 *

In Case C-146/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Bundesfinanzhof (Germany), made by decision of 10 February 2005, received at the Court on 1 April 2005, in the proceedings

Albert Collée, as full legal successor to Collée KG,

v

Finanzamt Limburg an der Lahn,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

* Language of the case: German.

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 June 2006,

after considering the observations submitted on behalf of:

— Mr Collée, as full legal successor to Collée KG, by M. Preisinger, Steuerberater,

— the German Government, by M. Lumma, F. Huschens and C. Schulze-Bahr, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by M. Massella Ducci Teri, avvocato dello Stato,

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

after hearing the Opinion of the Advocate General at the sitting on 11 January 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first subparagraph of Article 28c(A)(a) 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 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) ('the Sixth Directive').

2 The reference was made in the course of proceedings between Mr Collée, as full legal successor to Collée KG ('Collée'), and the Finanzamt Limburg an der Lahn ('the Finanzamt') concerning the latter's refusal to grant an exemption from turnover tax ('VAT') in respect of an intra-Community supply made during the 1994 financial year.

Legal context

Community legislation

3 Under Article 2 of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person is to be subject to VAT.

4 Title XVIa, entitled 'Transitional arrangements for the taxation of trade between Member States', was added to the Sixth Directive by Directive 91/680.

5 The right of exemption in respect of intra-Community supplies of goods is provided for in Article 28c(A) of the Sixth Directive, which is worded as follows:

'Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Articles 5 and 28a(5)(a), dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

...'

6 Article 22 of the Sixth Directive, in the version resulting from Article 28h thereof, prescribes the formalities with which a person liable for payment of VAT is obliged to comply. It provides inter alia:

'...

2. (a) Every taxable person shall keep accounts in sufficient detail for value added tax to be applied and inspected by the tax authority.

...

3. (a) Every taxable person shall issue an invoice, or other document serving as invoice, in respect of goods and services which he has supplied or rendered to another taxable person or to a non-taxable legal person. Every taxable person shall also issue an invoice, or other document serving as invoice, in respect of the supplies of goods referred to in Article 28b(B)(1) and in respect of goods supplied under the conditions laid down in Article 28c(A). A taxable person shall keep a copy of every document issued.

...

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. That deadline may not be more than two months later than the end of each tax period. The tax period shall be fixed by each Member State at one month, two months or a quarter. Member States may, however, set different periods provided that they do not exceed one year.

(b) The return shall set out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, where

appropriate, and in so far as it seems necessary for the establishment of the basis of assessment, the total value of the transactions relative to such tax and deductions and the value of any exempt transactions.

...

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

National legislation

7 Under Paragraph 4(1)(b) of the 1993 Law on Turnover Tax (Umsatzsteuergesetz 1993, BGBl. 1993 I, p. 565) ('the UStG'), intra-Community supplies, which are among the transactions falling within Paragraph 1(1)(1) of the UStG, are exempt from VAT.

8 Paragraph 6a(1) of the UStG provides that it is one of the conditions of an intra-Community supply that the trader or the customer must transport or dispatch the object of the supply to another part of the Community.

9 According to Paragraph 6a(3) of the UStG, it is for the trader to prove that the requirements of Paragraph 6a(1) have been met. The Federal Ministry of Finance may, with the approval of the Bundesrat, specify by way of regulations the detailed rules governing the production by traders of evidence of the transport or dispatch of goods which are the object of an intra-Community supply.

10 Paragraph 17a(1) of the Turnover Tax Implementation Regulations (Umsatzsteuer-Durchführungsverordnung 1993, BGBl. 1993 I, p. 601) ('the UStDV') provides that, with regard to intra-Community supplies, a trader to whom those regulations apply must produce documentary evidence to show that that trader or his customer transported or dispatched the object of the supply to another part of the Community.

11 Furthermore, according to Paragraph 17c(1) of the UStDV, the trader must produce accounting records to prove that the requirements for exemption from VAT have been met. Paragraph 17c(1) states inter alia that it 'must be clear and easily verifiable from the accounts' that the trader has fulfilled those requirements.

The main proceedings and the questions referred for a preliminary ruling

12 Collée was the parent company of a German-law limited liability company ('the GmbH') which sold cars as the authorised dealer for public limited company A ('A-AG'). In the spring of 1994, the GmbH entered into a contract with a Belgian dealer, B, for the sale of 20 demonstration vehicles. B transferred the net purchase monies to the GmbH's account and, after the latter had received payment, collected the vehicles from the premises of the GmbH using its own vehicle carrier.

13 The GmbH, which, on territorial protection grounds, was entitled to claim commission from A-AG only in respect of sales to customers established in the local area, engaged car dealer S as an intermediary. In return for a commission, S purchased and re-sold the demonstration vehicles for form's sake. The GmbH issued invoices showing the VAT to S in respect of that sham sale. S delivered blank invoices to the GmbH, which were subsequently used in the name of S in connection with the supply of the cars to B. In its VAT returns for the period from July to September 1994, S reclaimed the input tax invoiced to it by the GmbH.

14 Following a special investigation by the Finanzamt in October 1994, the Finanzamt refused to allow S to deduct the input VAT invoiced, because it had determined that the sale between the GmbH and S was a sham, S having intervened only for form's sake.

15 Having learned of that investigation, Collée informed S that the invoices for July to September 1994 had become redundant, cancelled the relevant account entries on 25 November 1994 and booked the corresponding sale proceeds to the 'exempted intra-Community supplies' account, recording the transaction in its provisional VAT return for November 1994.

16 By a tax amendment notice dated 12 February 1998, relating to VAT for 1994, the Finanzamt increased Collée's taxable turnover by an amount equivalent to that of the sale price of the cars supplied to B, but refused to allow a tax exemption in respect of that supply, on the ground that the prescribed records had not been updated regularly and immediately after the relevant transaction had been completed.

17 The objection to that tax notice was dismissed, as was the action brought before the Finanzgericht. Therefore, Mr Collée went on to lodge an appeal on a point of law ('Revision') before the Bundesfinanzhof. In support of that appeal, Mr Collée relies on the existence of accounting evidence in relation to the contract of sale, the transfer of the sale proceeds and B's confirmation of collection, later supplemented by the invoices issued to B by the GmbH. Convinced that those commercial records proved that an intra-Community supply had occurred, Mr Collée applied for the tax notice to be corrected so that the supply of demonstration vehicles made at the beginning of 1994 would be treated as being exempt from tax.

18 The referring court states that, according to its own case-law in relation to the evidential requirements for export deliveries to third countries, which applies equally to the dispute before that court, the supporting documents are an integral part of the accounting evidence, and the records required for the purposes of that accounting evidence must be updated regularly and immediately after the relevant transaction has been completed. Having established that the latter requirement has not been fulfilled in the present case, the court questions how the conflict between the obligation to produce evidence of the intra-Community supply and the principle of proportionality is to be resolved under Community law.

19 Therefore, as the Bundesfinanzhof is of the view that interpretation of the Sixth Directive is required in order for the dispute before it to be resolved, it decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a tax authority entitled to refuse to allow an intra-Community supply, which undoubtedly occurred, to be exempt from tax solely on the ground that the taxable person did not produce the prescribed accounting evidence in good time?

(2) Does the answer to the question depend on whether the taxable person initially knowingly concealed the fact that an intra-Community supply had occurred?'

Questions referred for a preliminary ruling

20 By its questions, which should be considered together, the referring court asks, in essence, whether the first subparagraph of Article 28c(A)(a) of the Sixth Directive should be interpreted as precluding the refusal by the tax authority of a Member State to allow an intra-Community supply — which actually took place — to be exempt from VAT solely on the ground that the evidence of such a supply was not produced in good time. The referring court also raises the question whether the fact that the taxable person initially and knowingly concealed the occurrence of an intra-Community supply is relevant in that regard.

21 It should be noted at the outset that the Member States' obligation to exempt intra-Community supplies of goods is laid down in the first subparagraph of Article 28c(A)(a) of the Sixth Directive. It is clear from that provision that Member States are to exempt supplies of goods dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory of a Member State but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

22 As a derogation from the fundamental principle which underlies the common system of VAT, according to which VAT applies to each transaction by way of production or distribution (see, in particular, Case C-62/93 *BP Soupergaz* [1995] ECR I-1883, paragraph 16; Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen*

and Others [2006] ECR I-483, paragraph 54; and Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 49), that exemption is based on the transitional VAT regime applicable to intra-Community trade, under which the taxation of trade between the Member States is based on the principle that tax revenues should accrue to the Member State in which the final consumption takes place (see Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 22).

23 Thus, the exemption of an intra-Community supply in the Member State of departure of the intra-Community dispatch or transport of goods, which has, as its corollary, an intra-Community acquisition that is taxed in the Member State of arrival of the goods dispatched or transported, enables double taxation and, therefore, infringement of the principle of fiscal neutrality inherent in the common system of VAT to be avoided (see, to that effect, Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraphs 24 and 25).

24 As regards the evidence required to be furnished by taxable persons in order for them to benefit from the exemption from VAT, clearly none of the provisions of the Sixth Directive relates directly to that issue. The first part of the first sentence of Article 28c(A) of the Sixth Directive merely provides that it is for the Member States to lay down the conditions subject to which they will exempt intra-Community supplies of goods (*Twoh International*, paragraph 25).

25 Article 22 of the Sixth Directive does impose a number of formal obligations on those liable to pay tax relating to accounts, invoicing, returns and the submission of recapitulative statements to the tax authority. However, Article 22(8) gives Member States the power to impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of tax evasion.

26 However, it is apparent from settled case-law that the measures which the Member States may adopt under Article 22(8) of the Sixth Directive in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives (see Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 52, and the order of 3 March 2004 in Case C-395/02 *Transport Service* [2004] ECR I-1991, paragraph 29). Those measures may not therefore be used in such a way as to have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation (see Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraph 59, and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 92).

27 The German Government submits that the requirements relating to the evidence of supporting documents and accounting records do satisfy the principle of proportionality because they do not systematically undermine the right of exemption from VAT in respect of an intra-Community supply. First, those requirements pursue an objective expressly laid down in the first subparagraph of Article 28c(A)(a) of the Sixth Directive, namely a lawful and straightforward levy and the prevention of abuse and, second, they are necessary in order to prevent 'carousel' fraud.

28 It should be noted in that regard that the refusal to allow an exemption from VAT in the main action is not, according to the order for reference, attributable to the requirement under German legislation that a taxable person should be obliged to produce evidence of the intra-Community supply in the form of documentary evidence and accounting records. In fact, that refusal results from the case-law of the Bundesfinanzhof, according to which the records required as accounting evidence must be updated regularly and immediately after the relevant transactions have been completed, a condition which was not fulfilled in the main action, although it has been clearly established that an intra-Community supply occurred as the Finanzamt has in fact also admitted.

29 As regards, first, the question whether the tax authority can refuse to allow an intra-Community supply to be exempt from VAT solely on the ground that the accounting evidence of that supply was belatedly produced, it should be noted that a national measure which, in essence, makes the right of exemption in respect of an intra-Community supply subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied, goes further than is necessary to ensure the correct levying and collection of the tax.

30 Transactions should be taxed taking into account their objective characteristics (see, in particular, *Optigen and Others*, paragraph 44, and *Kittel and Recolta Recycling*, paragraph 41). However, as regards determining whether a supply is of an intra-Community nature, it follows from the case-law of the Court that if a supply meets the conditions laid down in the first subparagraph of Article 28c(A)(a) of the Sixth Directive, no VAT is payable on such a supply (order in *Transport Service*, paragraphs 18 and 19).

31 In the main case, therefore, since it is apparent from the order for reference that there is no dispute about the fact that an intra-Community supply was made, the principle of fiscal neutrality requires — as the Commission of the European Communities also correctly submits — that an exemption from VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The only exception is if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied. However, that does not appear to be so in the main case.

32 Furthermore, the requirement that the prescribed accounts be updated immediately after the transaction has been completed, but without any precise time-limit for doing so being laid down, could undermine the principle of legal certainty which forms part of the Community legal order and with which the Member States must comply when they exercise the powers conferred on them by Community directives

(see Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-4191, paragraph 29).

33 As the Advocate General rightly pointed out in point 35 of her Opinion, it is important to allow amendments to the categorisation of an intra-Community supply which are made after the transaction has taken place to be reflected in the accounts of those taxable; in some cases such adjustments can become necessary as a result of circumstances outside their control. Therefore, the intra-Community nature of a supply must be recognised if the accounts are subsequently adjusted, provided that the objective criteria underlying the terms which define that transaction are satisfied.

34 Second, as regards the question whether the fact that the taxable person initially concealed the occurrence of an intra-Community supply is relevant to the answer to be given to the referring court and, therefore, whether the exemption from VAT may be conditional upon the good faith of that person, the answer to that question depends on whether the Member State concerned is at risk of losing any tax revenues.

35 In paragraph 18 of its judgment in Case C-342/87 *Genius Holding* [1989] ECR 4227, the Court held that, in order to ensure the neutrality of VAT, it is for the Member States to provide in their internal legal system for the possibility of correcting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith. However, in paragraphs 60 and 63 of its judgment in *Schmeink & Cofreth and Strobel*, it stated that where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss in tax revenues, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be adjusted without such adjustment being made conditional upon that issuer having acted in good faith (see Joined Cases C-78/02 to C-80/02 *Karageorgou and Others* [2003] ECR I-13295, paragraph 50). The same rules apply equally to an account adjustment made for the purpose of obtaining an exemption in respect of an intra-Community supply.

36 It is therefore for the national court to verify, taking into account all the relevant circumstances of the case which has been brought before it, whether the delay in the production of the accounting evidence could lead to a loss in tax revenues or jeopardise the levying of VAT.

37 In that regard, the non-collection of the VAT relating to an intra-Community supply which, initially, was incorrectly described as a supply effected within the territory of the country — giving rise, in principle, to the collection of VAT — cannot be regarded as a loss in tax revenues. According to the principle of territorial application of tax, such revenues belong to the Member State in which final consumption occurred.

38 Furthermore, it is for the national court to verify whether the concealment of an intra-Community transaction and the resulting delay in the adjustment of the relevant accounts are tainted by the evasion of VAT. It is settled case-law that Community law cannot be relied on for abusive or fraudulent ends (see, in particular, *Kittel and Recolta Recycling*, paragraph 54). Similarly, the application of Community legislation cannot be extended to cover transactions carried out for the purpose of wrongfully obtaining advantages provided for by Community law (see, to that effect, *Halifax and Others*, paragraph 69).

39 However, in circumstances such as those of the main action, the use of an intermediary for the collection of a contractual commission cannot be likened to a transaction that is tainted by tax evasion or to the use of Community law for abusive ends if it is established that the transaction was not carried out for the purpose of obtaining a tax advantage to which there was no entitlement.

40 Finally, it should be noted that Community law does not prevent Member States — in certain circumstances — from treating the concealment of the existence of an intra-Community transaction as an attempt to evade VAT and from imposing, in such a case, fines or penalty payments prescribed by their domestic law (see, to that effect, *Schmeink & Cofreth and Strobel*, paragraph 62). However, as the Commission rightly submits, such penalties should always be proportionate to the gravity of the abuse.

41 Therefore, the answer to the questions raised should be that the first subparagraph of Article 28c(A)(a) of the Sixth Directive must be interpreted as precluding the refusal by the tax authority of a Member State to allow an intra-Community supply — which actually took place — to be exempt from VAT solely on the ground that the evidence of such a supply was not produced in good time.

42 When examining the right of exemption from VAT in relation to such a supply, the referring court should take into account the fact that the taxable person initially knowingly concealed the fact that an intra-Community supply had occurred only if there is a risk of a loss in tax revenues and that risk has not been wholly eliminated by the taxable person in question.

Costs

43 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 (Third Chamber) hereby rules:

The first subparagraph of Article 28c(A)(a) 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 91/680/EEC of 16 December 1991, must be interpreted as precluding the refusal by the tax authority of a Member State to allow an intra-Community supply — which actually took place — to be exempt from value added tax solely on the ground that the evidence of such a supply was not produced in good time.

When examining the right of exemption from value added tax in relation to such a supply, the referring court should take into account the fact that the taxable person initially knowingly concealed the fact that an intra-Community supply had occurred only if there is a risk of a loss in tax revenues and that risk has not been wholly eliminated by the taxable person in question.

[Signatures]