JUDGMENT OF THE COURT (Third Chamber)

27 September 2007 *

In Case C-184/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 22 April 2005, received at the Court on 25 April 2005, in the proceedings

Twoh International BV

v

Staatssecretaris van Financiën,

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: Dutch.

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:

— Twoh International BV, by J.H. Sassen, advocaat,

— the Netherlands Government, by H.G. Sevenster, M. de Mol and P. van Ginneken, acting as Agents,

— the French Government, by G. de Bergues and C. Jurgensen-Mercier, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, and by E. Fitzsimons SC and B. Conway BL,

— the Italian Government, by I.M. Braguglia, acting as Agent, and G. De Bellis, avvocato dello Stato,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Portuguese Government, by L. Fernandes and C. Lança, acting as Agents,

— the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

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 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 8) ('the Sixth Directive'), read in conjunction with Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1) ('the mutual assistance directive'), and with Council Regulation

(EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) (OJ 1992 L 24, p. 1; 'the administrative cooperation regulation').

2 The reference has been made in the context of a dispute between Twoh International BV ('Twoh') and the Staatssecretaris van Financiën (Secretary of State for Finance) concerning an additional assessment to value added tax ('VAT') which was made on that company in respect of the year 1996 following an intra-Community supply of goods.

Legal context

Community legislation

The Sixth Directive

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 acting as such, and the import of goods, is subject to VAT.

4 The first subparagraph of Article 28c(A)(a) of the Sixth Directive provides:

'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 Article 5, 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.'

The mutual assistance directive

5 Article 1(1) of the mutual assistance directive provides:

'In accordance with this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and capital and any information relating to the assessment of the following indirect taxes:

— value added tax,

...'

6 Article 2(1) of the mutual assistance directive provides:

'The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.'

The administrative cooperation regulation

7 According to Article 4(3) of the administrative cooperation regulation:

'From the data collected in accordance with paragraph 1 and solely in order to combat tax fraud, the competent authority of a Member State shall, wherever it considers it necessary for the control of intra-Community acquisitions of goods, obtain directly and without delay, or have direct access to, the following information:

— the value added tax identification numbers of all persons who have made the supplies referred to in the second indent of paragraph 2, and

— the total value of such supplies from each such person to each person to whom one of the value added tax identification numbers referred to in the first indent of paragraph 2 has been issued; the values shall be expressed in the currency of the Member State providing the information and shall relate to calendar quarters.'

8 Article 5 of the administrative cooperation regulation provides:

'1. Where the information provided under Article 4 is insufficient, the competent authority of a Member State may at any time and in specific cases request further information. The requested authority shall provide the information as quickly as possible and in any event no more than three months after receipt of the request.

2. In the circumstances described in paragraph 1 the requested authority shall at least provide the applicant authority with invoice numbers, dates and values in relation to individual transactions between persons in the Member States concerned.'

9 Article 6(4) of the administrative cooperation regulation provides:

'The competent authority of each Member State shall ensure that persons involved in the intra-Community supply of goods or of services are allowed to obtain confirmation of the validity of the value added tax identification number of any specified person.'

10 The conditions governing the exchange of information are laid down in Title III of the administrative cooperation regulation, the first subparagraph of Article 7(1) of which reads as follows:

'1. A requested authority in one Member State shall provide an applicant authority in another Member State with the information referred to in Article 5(2) provided that:

— the number and the nature of the requests for information made by the applicant authority within a specific period of time do not impose a disproportionate administrative burden on that requested authority,

— that applicant authority exhausts the usual sources of information which it can use in the circumstances to obtain the information requested, without running the risk of jeopardising the achievement of the desired end,

— that applicant authority requests assistance only if it would be able to provide similar assistance to the applicant authority of another Member State.'

National legislation

11 Under Article 9(2)(b) of the Wet op de omzetbelasting (Law on turnover tax) of 28 June 1968 (*Staatsblad* 1968, No 329) in the version applicable to the dispute in the main proceedings ('the 1968 Law'), there is a nil rate of tax for the supplies of goods and services referred to in Table II annexed to that law if the conditions laid down by way of general administrative measure are complied with.

12 Point 6(a) in that Table II provides that a nil rate of tax is to be applied to 'goods which are transported to another Member State where those goods are subject there to a tax on the intra-Community acquisition of those goods'.

13 Article 12(1) of the Uitvoeringsbesluit omzetbelasting (Implementing Regulation on turnover tax) 1968 provides:

'The right to application of the nil rate to the supplies referred to in Table II annexed to the [1968] Law applies only if the preconditions for it are apparent from accounts or documents.'

14 Article 4(3) of the Decision of the Staatssecretaris van Financiën of 20 June 1995 on the taxation of intra-Community supplies provides:

'If goods are supplied "ex-works" or "ex-warehouse" to a foreign purchaser (collect transactions) the intra-Community nature of the consignment may not be apparent from the consignment note or from the supplier's transport administration records.

Nevertheless, circumstances are conceivable in which the supplier may be sure that the foreign purchaser will transport the goods to another Member State. In addition to the existing system of administration documents and records, the purchaser in question must be an established purchaser — save where the supplier is aware that intra-Community supplies by him to that purchaser have led to problems — and that purchaser must also have given the following declaration.

That declaration, to be signed by the person who takes delivery of the goods supplied, shall contain at least the following details: the purchaser's name and, if the purchaser does not take delivery of the goods personally, the name of the person who does so on his behalf, the registration number of the vehicle with which the goods are to be transported, the number of the invoice on which the delivered goods are specified, the place to which the collector of the goods is to transport them and an acknowledgement that the purchaser is prepared to provide the tax authority with any further information concerning the destination of the goods. A model form of declaration is annexed hereto.

In the case of collect transactions in which the purchaser is not an established purchaser and in which the goods are paid for in cash and where the supplier is not in possession of documents confirming the intra-Community nature of the consignment, i.e. cases in which he has, apart from the invoice issued in the name of a foreign purchaser (on which the foreign VAT identification number of the purchaser is indicated), no other documents indicating the intra-Community nature of the supply, the supplier will be unable, without more evidence, to justify a nil rate. In those circumstances, the supplier can avoid the risk of additional assessment by charging Netherlands VAT to the purchaser. The purchaser must, when he transports the goods to another Member State, declare that to the Netherlands taxation authority. On that declaration he will be able to deduct the Netherlands VAT that has been charged.'

The dispute in the main proceedings and the question referred

15 During 1996, Twoh, a Netherlands company, supplied computer parts to undertakings established in Italy. According to the sales contracts, the parties were to use the 'ex-works' (EXW) delivery method, which is one of the international commercial clauses ('Incoterms 2000') drawn up by the International Chamber of Commerce.

Use of that clause meant that Twoh was required only to place the goods at the buyers' disposal at a warehouse situated in the Netherlands, responsibility for transport to Italy being a matter for the buyers.

16 No declaration concerning those deliveries, such as required by Netherlands tax law and intended to establish the intra-Community nature of the deliveries of goods so as to exempt them from VAT in the Netherlands, was sent to Twoh by its Italian customers. Twoh nevertheless took the view at all times that the deliveries it had made were intra-Community deliveries, to which the nil rate of VAT was applicable. It therefore issued invoices which did not include the amount of VAT and, consequently, did not pay VAT in respect of those deliveries.

17 Following an accounting enquiry, the Netherlands tax authorities took the view that it had not been demonstrated that the goods had been dispatched or transported to another Member State, and that, therefore, it was wrong that no VAT had been paid. They therefore notified Twoh of an additional assessment to VAT for the period from 1 January to 31 December 1996 in the amount of NLG 1 466 629 in respect of the tax alone, increased by a further 100% of that amount.

18 Twoh lodged an objection against that additional assessment to VAT, expressly requesting the Netherlands tax authorities to gather from the competent Italian authority, pursuant to the mutual assistance directive and the administrative cooperation regulation, information capable of establishing the intra-Community nature of those supplies. The Netherlands authorities decided not to accede to that request, and to maintain the additional assessment to VAT.

19 Twoh brought an action against that decision before the Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem), which, after production by the applicant of certain evidence concerning the supplies in question, annulled it in relation to three deliveries and reduced the amount of the additional assessment to VAT. That court nevertheless took the view that the Netherlands tax authorities were not required to request the competent Italian authority to undertake an enquiry in the destination Member State in order to check whether the goods in question had in fact been sent there. Twoh appealed on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against the judgment of the Gerechtshof te Arnhem.

20 The Hoge Raad der Nederlanden, taking the view that the case before it raised a question on the interpretation of Community law concerning proof of the dispatch or transport of goods, within the meaning of Article 28c(A)(a) of the Sixth Directive, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 28c(A)(a) of the Sixth Directive — in conjunction with [Directive 77/799] and [Regulation No 218/92] — to be interpreted as meaning that, if no relevant information has been provided voluntarily by the Member State of arrival, the Member State of the dispatch or transport of the goods must request the alleged Member State of arrival of those goods to provide information and must take the results of that request into account when examining the evidence of the dispatch or transport of the goods?'

The question referred

21 By its question, the referring court asks in essence whether the first subparagraph of Article 28c(A)(a) of the Sixth Directive, read in conjunction with the mutual assistance directive and the administrative cooperation regulation, must be interpreted as meaning that the tax authorities of the Member State from which

dispatch or transport of goods on an intra-Community supply took place are required to request information from the authorities of the destination Member State alleged by the supplier and to use that information in order to determine whether the goods have in fact been the subject-matter of an intra-Community supply.

22 It should be noted at the outset that, under the transitional VAT regime applicable to intra-Community trade, established by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1), the taxation of trade between Member States is based on the principle that the tax receipt is attributed to the Member State where final consumption takes place. Any intra-Community acquisition that is taxed in the Member State where the dispatch or intra-Community transport of goods ends under the first subparagraph of Article 28a(1)(a) of the Sixth Directive has, as a corollary, an exempted supply in the Member State in which that dispatch or transport began under the first subparagraph of Article 28c(A)(a) of that directive (Case C-245/04 *EMAG Handel Eder* [2006] ECR I-3227, paragraph 29; Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraphs 22 and 24).

23 Concerning the conditions in which exemption of the intra-Community supply of goods for the purposes of the first subparagraph of Article 28c(A)(a) of the Sixth Directive becomes applicable, the Court held in paragraph 42 of its judgment in *Teleos and Others* that it is necessary for that purpose for the right to dispose of the goods as owner to have been transferred to the buyer and for the supplier to establish that the goods have been dispatched or transported to another Member State and that, as a result of that dispatch or transport, the goods have physically left the territory of the Member State of origin.

24 The Court has also held, in paragraph 44 of *Teleos and Others*, that, following the abolition of frontier controls between Member States, it is principally on the basis of

evidence provided by taxable persons and of their statements that the tax authorities are to check whether or not the goods have physically left the territory of the Member State of dispatch.

25 As for the evidence which taxpayers are required to provide, there is no provision of the Sixth Directive which deals directly with the question. That directive merely provides, in the first part of the sentence in Article 28c(A), that it is for the Member States to determine the conditions in which they will exempt intra-Community supplies of goods. However, when they exercise their powers, Member States must comply with general principles of Community law, which include, in particular, the principles of legal certainty and proportionality (see, to that effect, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paragraph 48; Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-4191, paragraphs 29 and 30).

26 The Court considers that, as the Commission of the European Communities has correctly argued, the principle that the burden of proving entitlement to a tax derogation or exemption rests upon the person seeking to benefit from such a right is to be viewed as being within the limits imposed by Community law. Thus, for the purpose of applying the first subparagraph of Article 28c(A)(a) of the Sixth Directive, it is for the supplier of the goods to furnish the proof that the conditions for exemption referred to in paragraph 23 of this judgment are fulfilled.

27 In that context, it should be noted that, in paragraph 50 of its judgment in *Teleos and Others*, the Court held that it would be contrary to the principle of legal certainty for a Member State, having laid down the requirements for applying the exemption for intra-Community supply, such as by prescribing a list of the documents to be presented to the competent authorities, and which initially accepted the documents presented by the supplier as documentary evidence of the right to the exemption, subsequently to require that supplier to account for the VAT

on that supply where it becomes apparent that, by reason of a fraud by the buyer of which the supplier could not have been aware, the goods concerned did not in fact leave the territory of the Member State of supply.

28 It is true that in this case, unlike in *Teleos and Others*, the decision to refer gives no details concerning the good faith of Twoh and gives no indication as to whether its customer committed a fraud. What is important in this case is the fact that Twoh, being unable to provide the necessary evidence to establish that the goods have in fact been dispatched to the destination Member State, has requested the Netherlands tax authorities to gather information capable of demonstrating the intra-Community nature of its supplies from the competent authority of that latter Member State, in application of the mutual assistance directive and the administrative cooperation regulation. The question that thus arises is whether those tax authorities were required to accede to such a request.

29 The answer to that question may be deduced from the purpose and content of the mutual assistance directive and the administrative cooperation regulation.

30 First, concerning the purpose of those two Community measures, the first and second recitals of the mutual assistance directive and the third recital of the administrative cooperation regulation show that their aim is to combat tax evasion and avoidance and to allow Member States to determine exactly the amount of tax to levy (see, by analogy, Case C-420/98 *W.N.* [2000] ECR I-2847, paragraphs 15 and 22, and, concerning Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1), Case C-533/03 *Commission* v *Council* [2006] ECR I-1025, paragraphs 49 and 52).

31 Secondly, concerning the content of those Community measures, it is clear from the titles of the mutual assistance directive and the administrative cooperation regulation that they were adopted in order to govern cooperation between the tax authorities of the Member States. As both the Commission and the Advocate General, in point 23 of her Opinion, have pointed out, those legal measures confer no right on individuals other than that of obtaining confirmation of the validity of the 'value added tax identification number of any specified person' in accordance with Article 6(4) of the administrative cooperation regulation.

32 The mutual assistance directive does provide, with a view to preventing tax evasion, for the possibility of national tax authorities requesting information which they cannot obtain for themselves. Thus, the fact that, both in Article 2(1) of that directive and in Article 5(1) of the administrative cooperation regulation, the Community legislature used the word 'may' indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State.

33 Further, those Community measures also lay down limits on cooperation between the Member States, since the authorities of the requested State are not required to supply the information requested in all circumstances. Indeed, the first indent of the first subparagraph of Article 7(1) of the administrative cooperation regulation provides that the number and nature of the requests for information made within a given period may not impose disproportionate administrative burdens on those authorities. Moreover, the second indent of the same provision as well as Article 2(1) of the mutual assistance directive provide that the latter are not required to supply information where it appears that the competent authority of the requesting State has not exhausted its own usual sources of information.

34 It follows that the mutual assistance directive and the administrative cooperation regulation were not adopted for the purpose of establishing a system for exchanging information between the tax authorities of the Member States allowing them to establish the intra-Community nature of supplies made by a taxable person who is not himself able to provide the necessary evidence for that purpose.

35 That finding is also corroborated by the case-law of the Court of Justice on mutual assistance between the competent authorities in the area of direct taxation, which is transposable by analogy to a situation such as that in the main proceedings. According to that case-law, the mutual assistance directive may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of tax. There is, however, nothing to prevent the tax authorities concerned from requiring the taxpayer himself to provide such proof as they may consider necessary in order to determine whether or not the deduction requested should be granted (see, to that effect, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26; Case C-136/00 *Danner* [2002] ECR I-8147, paragraphs 49 and 50).

36 The information which the mutual assistance directive allows the competent authorities of a Member State to request is in fact all the information which appears to them to be necessary in order to ascertain the correct amount of tax in relation to the legislation which they have to apply themselves. That directive does not in any way affect the competence of those authorities to assess in particular whether the conditions to which that legislation subjects the exemption of an operation are fulfilled (see, by analogy, *Vestergaard*, paragraph 28).

37 Finally, it should be added that, even if the tax authorities of the dispatching Member State did obtain information from the destination Member State that the buyer had submitted a declaration to the tax authorities of that latter State that there

was intra-Community acquisition, such a declaration does not constitute decisive proof capable of establishing that the goods actually left the territory of the dispatching Member State (*Teleos and Others*, paragraphs 71 and 72).

38 In view of the above considerations, the answer to the question referred must be that the first subparagraph of Article 28c(A)(a) of the Sixth Directive, read in conjunction with the mutual assistance directive and the administrative cooperation regulation, does not require the tax authorities of the Member State of dispatch or transport on an intra-Community supply of goods to request information from the authorities of the destination Member State alleged by the supplier.

Costs

39 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 95/7/EC of 10 April 1995, read in conjunction with Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation, as amended by Council Directive 92/12/EEC of 25 February 1992, and with Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation, does not require the tax authorities of the Member State of dispatch or transport on an intra-Community supply of goods to request information from the authorities of the destination Member State alleged by the supplier.

[Signatures]