61994J0286

Judgment of the Court (Fifth Chamber) of 18 December 1997. - Garage Molenheide BVBA (C-286/94), Peter Schepens (C-340/95), Bureau Rik Decan-Business Research & Development NV (BRD) (C-401/95) and Sanders BVBA (C-47/96) v Belgische Staat. - References for a preliminary ruling: Hof van Beroep Antwerpen, Rechtbank van eerste aanleg Brussel, Rechtbank van eerste aanleg Brugge - Belgium. - Sixth Directive 77/388/EEC - Scope - Right to deduction of VAT - Retention of balance of VAT due - Principle of proportionality. - Joined cases C-286/94, C-340/95, C-401/95 and C-47/96.

European Court reports 1997 Page I-07281

Parties

In Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hof van Beroep te Antwerpen (Belgium) (C-286/94 and C-340/95), the Rechtbank van Eerste Aanleg te Brussel (C-401/95) and the Rechtbank van Eerste Aanleg te Brugge (Belgium) (C-47/96) for a preliminary ruling in the proceedings pending before that court between

Garage Molenheide BVBA (C-286/94), Peter Schepens (C-340/95), Bureau Rik Decan-Business Research & Development NV (BRD) (C-401/95), Sanders BVBA (C-47/96)

and

Belgian State

on the interpretation of Article 18(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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 COURT

(Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J.C. Moitinho de Almeida, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: N Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Garage Molenheide BVBA, by V. Dauginet, of the Antwerp Bar,

- Bureau Rik Decan-Business Research & Development NV (BRD) and Sanders BVBA, by L. Vandenberghe and R. Tournicourt, of the Brussels Bar,

- the Belgian Government, by J. Devadder, Counsellor General, Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

- the Greek Government (C-340/95, C-401/95 and C-47/96), by F. Georgakopoulos, Deputy Legal Adviser, Legal Council of State, and A. Rokophyllou, Special Adviser to the Deputy Minister of Foreign Affairs, acting as Agents,

- the Italian Government (C-286/94, C-340/95 and C-401/95), by Professor Umberto Leanza, Head of the Department of Contentious Diplomatic Affairs, Ministry of Foreign Affairs, acting as Agent, assisted by Maurizio Fiorilli, Avvocato dello Stato,

- the Swedish Government (C-401/95), by E. Brattgård, Departmental Adviser, Department of Foreign Trade, Ministry of Foreign Affairs, acting as Agent, and

- the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Garage Molenheide BVBA, represented by M. Vanden Broeck, of the Antwerp Bar, Bureau Rik Decan-Business Research & Development NV (BRD) and Sanders BVBA, represented by L. Vandenberghe, the Belgian Government, represented by B. van de Walle de Ghelcke and G. de Wit, of the Brussels Bar, the Greek Government, represented by F. Georgakopoulos, the Italian Government, represented by G. De Bellis, Avvocato dello Stato, and the Commission, represented by B.J. Drijber, at the hearing on 30 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 March 1997,

gives the following

Judgment

Grounds

1 By orders of 17 October 1994 (C-286/94), 25 October 1995 (C-340/95), 12 December 1995 (C-401/95) and 6 February 1996 (C-47/96), received at the Court Registry on 21 October 1994, 30 october 1995, 21 December 1995 and 16 February 1996 respectively, the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp), 13th and 3rd Chambers (C-286/94 and C-340/95), the Rechtbank van Eerste Aanleg te Brussel (Court of First Instance, Brussels) (C-401/95) and the Rechtbank van Eerste Aanleg te Brugge (Court of First Instance, Bruges) (C-47/96) referred to the

Court for preliminary rulings under Article 177 of the EC Treaty a number of questions on the interpretation of Article 18(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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, hereinafter `the Sixth Directive').

2 Those questions were raised in four actions brought against the Belgian State by Garage Molenheide BVBA (hereinafter `Molenheide'), Peter Schepens, Bureau Rik Decan-Business Research & Development NV (BRD) (hereinafter `Decan') and Sanders BVBA (hereinafter `Sanders').

The Community legislation

3 Article 18(2) and (4) of the Sixth Directive, concerning procedures relating to the right of deduction, provide:

`2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

...

4. Where for a given tax period the amount of authorized deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.'

The Belgian legislation

4 In Belgian law, Article 18(4) of the Sixth Directive was implemented in particular by Article 47 of the Value Added Tax Code, which provides that, where the authorized deductions exceed the tax due for a particular period, the excess is to be carried forward to the following tax period.

5 The first subparagraph of Article 76(1) of that Code, as amended by the Law of 28 December 1992, adds that any excess outstanding at the end of the calendar year is to be refunded in accordance with the conditions to be established by the King, on application by the taxable person. Pursuant to the second subparagraph, the King may permit the grant of refunds even before the end of the calendar year. Finally, according to the third subparagraph,

`[W]ith respect to the requirements laid down in the first and second subparagraphs, provision may be made by Royal Decree for a retention in favour of the VAT, Registration and Property Authority, having the effect of a preventive attachment within the meaning of Article 1445 of the Judicial Code.'

6 That provision was implemented by Article 7 of the Royal Decree of 29 December 1992, which inserted into Royal Decree No 4 of 29 December 1969 on refunds in respect of VAT (hereinafter `Royal Decree No 4') an Article 8/1(3) which is worded as follows:

`If the tax debt referred to in the first paragraph does not constitute, in favour of the administration, a debt which is, in whole or in part, certain, definite and due for payment, which is inter alia the case where it is disputed or has given rise to an order for recovery within the meaning of Article 85 of the Code, execution of which is opposed by an objection within the meaning of Article 89 of the Code, the tax credit shall be retained by the administration up to the amount of the tax claimed.

That retention shall take effect as a preventive attachment until the dispute has been definitively resolved, either in the administrative procedure or by a final court judgment. The condition laid down by Article 1413 of the Judicial Code shall be deemed to have been satisfied as regards the implementation of that retention [fourth subparagraph].

If, with regard to the balance refundable resulting from the return referred to in Article 55(1)(3) of the Code, and in respect of which the taxable person has or has not opted for a refund, either there are serious grounds for presuming or there is evidence that the aforesaid return or returns concerning previous periods contain inaccurate information and if such grounds for presumption or evidence point to the existence of a tax debt the actual existence of which cannot, however, be established before the time for the payment order or for the operation equivalent to payment, no payment order shall be made in respect of the balance nor shall the balance be carried forward to the following tax period, and the tax credit shall be retained in order to permit the administration to verify the accuracy of the information [fifth subparagraph].

...

The serious grounds for presumption or the evidence referred to in the foregoing subparagraph, proving or indicating the tax debt, must be established by an official report drawn up in accordance with Article 59(1) of the Code. The report shall be brought to the notice of the taxable person by registered letter [sixth subparagraph].

The retention referred to in subparagraphs (4) and (5) shall have the effect of a preventive attachment until the evidence contained in the report referred to in the foregoing subparagraph is refuted or until the accuracy of the relevant transactions emerges from information obtained under the cooperation mechanisms established by the European Communities on exchange of information between Member States of the Community [seventh subparagraph].

...

The taxable person may only contest the attachment referred to in paragraphs 4 and 5 in accordance with Article 1420 of the Judicial Code. However, the court having jurisdiction in the matter of attachments may not order the attachment to be lifted for so long as the evidence contained in the report referred to in subparagraph 6 has not been refuted, particulars have not been obtained by way of exchange of information between Member States of the Community or an investigation by either the Office of the Public Prosecutor or an examining magistrate is pending. The retention shall cease when the attachment is lifted by the administration or by judicial decision. If it is lifted by the administration, the taxable person shall be informed by registered letter indicating the date on which it was lifted [tenth subparagraph].

Where the tax credit ceases to be retained, the tax debt constituting a debt in favour of the administration which is certain, definite and due for payment shall if appropriate be discharged in accordance with subparagraph 2, without any formality having to be completed [eleventh subparagraph].'

7 Pursuant to Article 1413 of the Judicial Code, to which the fourth subparagraph of Article 8/1(3) of Royal Decree No 4 refers, a preventive attachment may be carried out only in cases where prompt action is required.

8 According to the national courts, the retention provided for in the fifth subparagraph of Article 8/1(3) of Royal Decree No 4, which operates as a preventive attachment within the meaning of Article 1445 of the Belgian Judicial Code, is designed to block by way of a precautionary measure the refundable VAT balance until proceedings concerning any sum which may be payable by the taxable person in respect of VAT are concluded, either by administrative decision or by a judicial decision which has become final or until the evidence or the serious grounds for presumption,

referred to in the official report, have been refuted or until the veracity of the transactions emerges from the information obtained under the procedures laid down by the rules adopted by the European Communities concerning the exchange of information between Member States or from an investigation by either the Office of the Public Prosecutor or an examining magistrate. The mechanism is essentially the same with regard to the other retention provided for in the fourth subparagraph of that provision.

Case C-286/94

9 Molenheide runs a garage in Antwerp (Belgium). That company filed, for the period from 1 January 1993 to 31 December 1993, a VAT return in which it claimed entitlement to a deduction in the sum of BFR 2 598 398.

10 However, during a check carried out at its premises, the VAT authority discovered circumstances giving rise to serious grounds for presuming that the return in question contained incorrect and incomplete particulars.

11 An official report was drawn up by the chief inspector of the main Wijnegem VAT office on the basis of those findings and was notified to Molenheide by registered letter of 15 June 1993. The official report also indicated that the relevant collector would effect a retention on the basis of it.

12 On 16 June 1993 a retention notice was served on Molenheide by registered letter. In that notice, the tax authority stated that there were serious grounds for presuming, and indeed evidence, that the abovementioned return contained incorrect particulars and that those grounds or evidence were indicative of a tax debt, the amount of which could not be properly determined at that time.

13 The retention, which corresponded to the refundable amount arrived at on the basis of the VAT return filed by Molenheide, was based on the fifth subparagraph of Article 8/1(3) of Royal Decree No 4.

14 On 23 July 1993 Molenheide contested the retention decision before the judge hearing attachment proceedings in the Rechtbank van Eerste Aanleg te Antwerpen, maintaining that the fifth subparagraph of Article 8/1(3) of Royal Decree No 4 was invalid.

15 By order of 4 november 1993, the judge hearing attachment proceedings declared the action unfounded.

16 On 24 December 1993 Molenheide appealed against that order to the Hof van Beroep te Antwerpen. In those proceedings Molenheide claimed that the retention of tax credits, as provided for by the third subparagraph of Article 76(1) of the Belgian VAT Code and by the fifth subparagraph of Article 8/1(3) of Royal Decree No 4, was contrary to Articles 18(4) and 27 of the Sixth Directive.

17 Uncertain as to how the latter provisions should be interpreted, the Hof van Beroep te Antwerpen considered it appropriate to seek a preliminary ruling from the Court of Justice on the following question:

`On a proper construction of Article 18(4) of the Sixth VAT Directive, may a Member State refrain from refunding substantial VAT credits of its residents or carrying them forward to a following tax period, and instead attach them as a protective measure under national rules owing to the existence of serious grounds for suspecting tax evasion, without creating a definitive legal title in that respect and without the Member State having received any authorization under Article 27 of the Sixth VAT Directive?'

Case C-340/95

18 This case too is concerned with a retention under the fifth subparagraph of Article 8/1(3) of Royal Decree No 4, prompted by serious grounds for presumption of tax evasion.

19 Mr Schepens owns a garage. He filed a VAT return for the period from 1 January 1993 to 31 March 1993 in which he claimed the right to refund of the sum of BFR 3 311 438.

20 Following a check carried out in May 1993 a chief inspector and an auditor from the VAT authority drew up an official report on 15 June 1993 to the effect that there were serious grounds for presuming that the VAT returns for the first quarter of 1993 contained incorrect particulars and gave grounds for concluding that tax was payable. On 16 June 1993 the plaintiff was informed of the conclusions of the inspection by registered letter. He also received a copy of the official report and the tax authority informed him that it intended to retain the amounts that had been refundable. The retention notice was sent to him on 18 June 1993.

21 The tax authority followed the same procedure for the tax return for the second quarter of 1993, which showed a credit of BFR 2 419 078. After carrying out a check on 15 September 1993 it drew up an official report on 20 September 1993, which it notified to the person concerned by registered letter of 22 September 1993, followed on the same date by a retention notice.

22 Those serious grounds for presumption related in particular to a type of fraud known as `circular sales', not involving evasion of VAT but creating fictitious VAT excesses, in particular on intra-Community transactions. Thus, according to the Belgian administrative authorities, Mr Schepens sought to recover amounts of VAT which he claimed to have paid when purchasing a number of vehicles. However, the findings of the tax authority established that eight of his suppliers had not filed VAT returns for the first quarter of 1993 or paid any VAT. Moreover, Mr Schepens had likewise not proved that he had paid them the VAT, all the transactions having been conducted in cash or by cheque. Most of the vehicles had been delivered outside Belgium but within the Community and at least some of them had been purchased more than once in Belgium. For each transaction, the VAT indicated on the Belgian purchase invoice had not been paid by the persons who issued the invoices and Mr Schepens had been unable to establish, by evidence of the kind prescribed in Article 3 of Royal Decree No 52, that he had in fact delivered the vehicles outside Belgium but within the Community. For February and March 1993, the intra-Community transactions carried out represented an amount of BFR 11 625 000.

23 In the case of the intra-Community deliveries, the VAT had not been accounted for on the outgoing invoices and, under the VAT mechanism, the right to refund of the VAT mentioned on the corresponding purchase invoices came into being. Moreover, there were grounds for presuming that those vehicles had never left Belgium.

24 Mr Schepens then applied for the lifting of the retentions or the preventive attachments carried out.

25 His application was refused by the competent court of first instance, whereupon he appealed to the Hof van Beroep te Antwerpen, claiming, on the basis of legal arguments similar to those advanced by Molenheide, that Article 18(4) of the Sixth Directive allowed a choice only between

carrying the excess forward to the following period and refunding it. Consequently, if it wished to follow another course, the Belgian State should, pursuant to Article 27 of the Sixth Directive, have sought authorization from the Council. Mr Schepens also invoked the principle of proportionality.

26 The Hof van Beroep te Antwerpen then referred the following questions to the Court for a preliminary ruling:

`1. Do Articles 18(4) and 27 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (VAT Directive 77/388/EEC) have direct effect in the national legal systems of the Member States and thus in Belgian law?

2. If so, does Article 18(4) of the Directive preclude a Member State from refusing to refund to a taxable person a VAT credit in relation to a specific period or periods during which that credit arose or to carry it over to a subsequent tax period, and instead withholding it by means of the Belgian withholding procedure, which has the effect of a preventive attachment within the meaning of Article 1445 of the Belgian Judicial Code, as long as no definitive entitlement has arisen in that regard and only up to the amount of the demand relating to that tax period or earlier periods, where the demand is disputed by the taxable person?

3. Is Article 18(4) of the Directive applicable, given that, according to the Belgian State, such withholding is a debt-recovery procedure?

- If so, is Article 27 of the Directive applicable if such withholding were to form part of the "conditions" (modalités)?

- If not, is Article 27 applicable, on the assumption that such withholding is a debt-recovery procedure?

4. If Article 18(4) of the Directive is applicable to the Belgian withholding procedure, does that procedure infringe the principle of proportionality as defined by the Court of Justice?'

Case C-401/95

27 In this case the retention was made on the basis not of the fifth subparagraph, but on the fourth subparagraph, of Article 8/1(3) of Royal Decree No 4.

28 By registered letter of 26 September 1995, the tax authority informed Decan that on that date it was effecting a retention or preventive attachment of the VAT credit of BFR 705 404 resulting from its VAT return for the period from 1 to 30 June 1995. That retention was made because of a VAT debt claimed by the Belgian State for a period covered by an earlier return. Without giving further particulars of the debt claimed, the national court states that it was recorded in an official report of 26 May 1994 and that it was the subject of an order for recovery served on 10 October 1995 in respect of the sum of BFR 784 305, together with fines of BFR 130 500 and interest of BFR 232 064.

29 Before the Rechtbank van Eerste Aanleg te Brussel, the parties put forward the same arguments as those exchanged in the two other cases described above, and the national court has merely referred to the orders relating to those cases. It adds, however, that whilst in the Molenheide case there were serious grounds for presumption of tax evasion, the position is different in the Decan case.

30 The Rechtbank van Eerste Aanleg te Brussel therefore referred the following questions to the Court for a preliminary ruling:

`1. Must Article 18(4) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes be interpreted as permitting a Member State

to refuse to refund a VAT credit from a specific tax period or to carry it forward to a following period, yet to retain it on the ground that, and for so long as, it has a claim against the taxpayer in question relating to a previous tax period, if that claim is disputed by the taxpayer and thus does not yet constitute a definitive title, where the Member State has not received any authorization under Article 27 of the Sixth VAT Directive?

2. If Question 1 is to be answered in the affirmative, must Article 18(4) of the Sixth VAT Directive, in conjunction with the principle of proportionality, be interpreted as permitting the Member State to lay down that the necessity or urgency of the retention may not be contested in any way and that the retention may in no way be replaced by a guarantee or annulled so long as the disputed VAT claim has not been made the subject-matter of a final judicial decision?'

Case C-47/96

31 As in the Decan case, the retention was made pursuant to the fourth subparagraph of Article 8/1(3) of Royal Decree No 4.

32 According to an official report of 30 January 1992, Sanders owes the Belgian State VAT in the sum of BFR 370 791 (together with a fine of BFR 741 582 and interest as from 21 January 1988) for the purchase without an invoice of 227 000 kg of flour from CERES NV and for involvement in the delivery of 403 710 kg of flour by the latter company to a third party. Those transactions were carried out in 1987.

33 Sanders contested that debt, which is thus not certain, definite and due for payment within the meaning of the fourth subparagraph of Article 8/1(3) of Royal Decree No 4, whereupon the Roeselare VAT collector, by registered letter of 23 November 1994, gave notice that it was retaining, by way of preventive attachment in respect of the abovementioned debt, the balance of the current account relating to its periodical VAT return made up to 31 October 1994, namely BFR 236 215.

34 On 5 January 1995 Sanders instituted proceedings against the Belgian State for lifting of the preventive attachment before the judge hearing attachment proceedings in the Rechtbank van Eerste Aanleg te Brugge, relying on the same arguments as those put forward in the other cases, and on the principle of proportionality, since in its view the retention was neither necessary nor the only measure available.

35 Uncertain as to how to interpret the Community provisions relied on, the judge hearing attachment proceedings also decided to seek a preliminary ruling on the following two questions:

`1. Must Article 18(4) of the Sixth VAT Directive be interpreted as permitting a Member State, instead of refunding to a taxable person a VAT credit for a given tax period, or carrying it forward to a subsequent tax period, to "withhold" the same by way of protective attachment on the basis of an additional demand in respect of an earlier tax period, where that additional demand is contested in law and is thus not based on any definitive entitlement, and where the Member State has not obtained authorization pursuant to Article 27 of the VAT Directive?

2. In the event that Question 1 is answered in the affirmative:

Do the principle of proportionality enshrined in Community law and Article 18(4) of the Sixth VAT Directive permit the Member State to provide:

(1) that the taxable person may contest the attachment (as validated by the "withholding" measure) only by adducing evidence rebutting the allegations made by the Treasury in the official report, and not by challenging the actual need for, and urgency of, that measure;

(2) that withholding may not be replaced by another form of security nor lifted pending the delivery of final judgment on the contested demand for payment made by the Treasury?'

The preliminary questions

36 In these four cases the national courts essentially wish to ascertain whether Article 18(4) of the Sixth Directive precludes measures such as those at issue in the main proceedings and, if not, what effect the principle of proportionality might have in such circumstances.

37 With regard, first, to Article 18(4) of the Sixth Directive, the national courts ask essentially whether that provision precludes national measures providing for the preventive attachment of a refundable VAT credit where either there are serious grounds for presumption of tax evasion or there is a VAT debt claimed by the tax authority, that debt being contested by the taxable person.

38 The applicants consider that the retentions provided for in the fourth and fifth subparagraphs of Article 8/1(3) of Royal Decree No 4 are incompatible with Article 18(4) of the Sixth Directive since, where the VAT excess is not insignificant, the national administrative authority may only choose either to make a refund or to carry the excess forward to the period covered by the next return. Retention of the balance, which is not covered by that choice, constitutes an outright negation of the taxable person's right to deduct VAT.

39 The applicants also maintain that Article 18(2) and (4) of the Sixth Directive refer to periods covered by returns and infer that the Belgian authority may not retain a VAT balance relating to a period other than the period to which the dispute relates, an approach which, moreover, is consistent with the requirement for a reasonable time-limit.

40 On the other hand, the Belgian, Greek, Italian and Swedish Governments and the Commission maintain that the retentions provided for by the Belgian legislation constitute `measures of recovery' and, as such, are not governed by the Sixth Directive or by the applicable Community legislation but fall within the exclusive competence of the Member States.

41 Measures such as those at issue in the main proceedings are designed to enable the competent fiscal authorities to retain, as a protective measure, refundable amounts of VAT where there are grounds for presumption of tax evasion or where those authorities claim that there is a VAT debt owing to them which is not apparent from the taxable person's returns and which the taxable person contests.

42 It is clear from the Sixth Directive as a whole that it is intended to establish a uniform basis so as to guarantee the neutrality of the system and, as indicated in the 12th recital in its preamble, to harmonize the rules governing deductions `to the extent that they affect the actual amounts collected' and to ensure that `the deductible proportion [is] calculated in a similar manner in all the Member States'.

43 It follows that Title XI of the Sixth Directive, which deals with deductions, and in particular Article 18, relates to the normal functioning of the common system of VAT and does not in principle concern measures such as those described in paragraph 41 above.

44 The answer to be given must therefore be that Article 18(4) of the Sixth Directive does not in principle preclude measures of the kind at issue in the main proceedings.

45 As regards, next, the effects which the principle of proportionality may have in this context, it must be emphasized that whilst the Member States may, in principle, adopt such measures, it is nevertheless the case that those measures are liable to have an impact on the national authorities' obligation to make an immediate refund under Article 18(4) of the Sixth Directive.

46 Thus, in accordance with the principle of proportionality, the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant Community legislation.

47 Accordingly, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the Treasury as effectively as possible, they must not go further than is necessary for that purpose. They may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation.

48 The answer to be given in that regard must therefore be that the principle of proportionality is applicable to national measures which, like those at issue in the main proceedings, are adopted by a Member State in the exercise of its powers relating to VAT, since, if those measures go further than necessary in order to attain their objective, they would undermine the principles of the common system of VAT and in particular the rules governing deductions which constitute an essential component of that system.

49 As regards the specific application of that principle, it is for the national court to determine whether the national measures are compatible with Community law, the competence of the Court of Justice being limited to providing the national court with all the criteria for the interpretation of Community law which may enable it to make such a determination (see in particular Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165).

50 In that connection, the applicants submit, first, that the retention is absolute and is effected automatically as soon as there is a dispute between the administrative authority and the taxable person. In their view, the retention provided for by the fourth subparagraph of Article 8/1(3) of Royal Decree No 4 is, by virtue of the actual wording of that provision, compulsory whenever a tax debt is contested, this being a rule to which there are no exceptions, and the court seised of the matter is not required to consider whether such a retention is necessary or whether the matter is urgent, those conditions being irrebuttably presumed to be satisfied. The same applies in their view to the retention provided for by the fifth subparagraph of the same provision.

51 It must be held that, where a preventive attachment procedure constitutes a derogation from the ordinary law applicable to preventive attachments, in that necessity and urgency are irrebuttably presumed, doubts may legitimately be entertained as to whether it is an indispensable instrument for ensuring recovery of the sums due.

52 It must therefore be held that an irrebuttable presumption, as opposed to an ordinary presumption, would go further than is necessary in order to ensure effective recovery and would be contrary to the principle of proportionality in that it would not enable the taxable person to adduce evidence in rebuttal for consideration by the judge hearing attachment proceedings.

53 Second, the applicants draw attention to the lack of any effective remedies both before the judge hearing attachment proceedings and in the proceedings on the substance of the case. Without the consent of the VAT authority, the judge hearing attachment proceedings is, according to the applicants, never permitted, save where a formal requirement has been infringed, to lift in whole or in part the retention of the refundable balance. That situation derives from the combined effect of various legal provisions, for the most part derogating from the ordinary law relating to

preventive attachments, which provide that the judge hearing attachment proceedings may not order such a measure until such time as the evidence contained in the official reports of the tax authority is refuted or the genuineness of the transactions emerges from the particulars obtained through the Community procedures for exchange of information between Member States. The judge hearing attachment proceedings is thus concerned only with the formal propriety of the preventive attachment procedure, not with the substantive conditions governing the attachment.

54 For the same reasons, where there is an appeal by the administrative authority against a decision favourable to the taxable person, it is impossible to have the attachment lifted, even partially (for example, in respect of the fines), since the decision does not definitively dispose of the substantive issues. The retention operates as a preventive attachment until the dispute has been finally determined, either by administrative measure or by a judgment which has become definitive.

55 In that connection, it must be observed that, in considering whether the adverse effect on the right of deduction is proportionate, the availability of effective judicial review is necessary both in the proceedings on the substance of the case and in those before the judge hearing attachment proceedings.

56 Consequently, provisions of laws or regulations which would prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT balance, even though there is evidence before him which would prima facie justify the conclusion that the findings of the official reports drawn up by the administrative authority were incorrect, should be regarded as going further than is necessary in order to ensure effective recovery and would adversely affect to a disproportionate extent the right of deduction.

57 Similarly, provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT balance before the decision on the substance of the case becomes definitive would be disproportionate.

58 Third, the applicants observe that it is impossible for the taxable person to request a court to adopt in place of the retention a different protective measure which is sufficient to protect the interests of the Treasury but is less onerous for the taxable person, such as, for example, provision of a bond or a bank guarantee. Such a possibility is open only to the tax authority and is entirely a matter for its discretion.

59 It must be pointed out that such impossibility, if proved, would also exceed the bounds of what is necessary to guarantee recovery of any sums due, in that the substitution in question might mitigate the adverse effect on the right of deduction and the grant of such a measure should be amenable to review by a court.

60 Fourth, the applicants observe that the retention is not limited to the principal amount due in respect of VAT but also covers interest on it, procedural costs and penalties which may amount to as much as 200% of the principal amount. That measure is thus disproportionate to the objective which it pursues, in particular where the dispute concerns a question of pure law and not tax evasion in the strict sense.

61 In that regard, it must be observed that the exercise of effective judicial review of the kind described above, in particular if both the court adjudicating on the substance of the case and the judge hearing attachment proceedings were able to grant the taxable person, at his request and at any stage of the procedure, a total or partial lifting of the retention, would suffice to eliminate any lack of proportionality in the calculation of the amounts retained, in particular as far as penalties are concerned.

62 Fifth, the applicants state that, under Belgian law, in the event of release of the retained VAT balances, interest is not payable by the Treasury unless the sums retained have not been duly returned by 31 March of the year following that in which the refundable balances came into being and unless the amount refundable is at least BFR 10 000, the last VAT return for the calendar year in which the VAT credit arose was signed at the place on the form indicated for that purpose and all the VAT returns have been filed within the prescribed time-limits.

63 In that regard, it must be observed that it is not necessary, in order to attain the objective pursued by legislation such as that at issue in the main proceedings, namely to ensure recovery of the amounts due, for interest to be calculated from a date other than that on which the retained VAT balance would normally have been paid under the Sixth Directive, and therefore that the principle of proportionality precludes the application of such legislation. The same applies to the other conditions mentioned above: in particular, lateness in filing returns can be penalized in a manner unconnected with the retention procedure and without affecting the right to refund of the VAT balance.

64 The answer to be given must therefore be that it is for the national court to examine whether or not the measures in question and the manner in which they are applied by the competent administrative authority are proportionate. In the context of that examination, if the national provisions or a particular construction of them would constitute a bar to effective judicial review, in particular review of the urgency and necessity of retaining the refundable VAT balance, and would prevent the taxable person from applying to a court for replacement of the retention by another guarantee sufficient to protect the interests of the Treasury but less onerous for the taxable person, or would prevent an order from being made, at any stage of the procedure, for the total or partial lifting of the retention, the national court should disapply those provisions or refrain from placing such a construction on them. Moreover, in the event of the retention being lifted, calculation of the interest payable by the Treasury which did not take as its starting point the date on which the VAT balance in question would have had to be repaid in the normal course of events would be contrary to the principle of proportionality.

Decision on costs

Costs

65 The costs incurred by the Belgian, Greek, Italian and Swedish Governments and by the Commission of the European Communities, 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 proceedings pending before the national courts, the decision on costs is a matter for those courts.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Hof van Beroep te Antwerpen, the Rechtbank van Eerste Aanleg te Brussel and the Rechtbank van Eerste Aanleg te Brugge by orders of 17 October 1994, 25 October 1995, 12 December 1995 and 6 February 1996, hereby rules:

1. Article 18(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment does not in principle preclude measures of the kind at issue in the main proceedings.

2. However, the principle of proportionality is applicable to national measures which, like those at issue in the main proceedings, are adopted by a Member State in the exercise of its powers relating to VAT, in that, if they went further than was necessary in order to attain their objective, they would undermine the principles of the common system of VAT, in particular the conditions governing deductions, which are an essential component of that system.

It is for the national court to examine whether or not the measures in question and the manner in which they are applied by the competent administrative authority are proportionate. In the context of that examination, if the national provisions or a particular construction of them would constitute a bar to effective judicial review, in particular review of the urgency and necessity of retaining the refundable VAT balance, and would prevent the taxable person from applying to a court for replacement of the retention by another guarantee sufficient to protect the interests of the Treasury but less onerous for the taxable person, or would prevent an order from being made, at any stage of the procedure, for the total or partial lifting of the retention, the national court should disapply those provisions or refrain from placing such a construction on them. Moreover, in the event of the retention being lifted, calculation of the interest payable by the Treasury which did not take as its starting point the date on which the VAT balance in question would have had to be repaid in the normal course of events would be contrary to the principle of proportionality.