Case C-97/06

Navicon SA

v

Administración del Estado

(Reference for a preliminary ruling from the

Tribunal Superior de Justicia de Madrid)

(Sixth VAT Directive – Exemptions – Article 15(5) – The concept of ‘chartering sea-going vessels’ – Compatibility of a national law allowing the exemption for full chartering only)

Opinion of Advocate General Mazák delivered on 29 March 2007

Judgment of the Court (Fourth Chamber), 18 October 2007

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive*

(Council Directive 77/388, Art. 15(5))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive*

(Council Directive 77/388, Art. 15(5) and (13))

1. Article 15(5) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 92/111, which exempts the chartering of vessels used for navigation on the high seas, must be interpreted as covering both full chartering and partial chartering of such vessels. Therefore, that provision precludes national legislation which grants the benefit of the exemption from value added tax only in the case of full chartering of such vessels.

In the context of international business, the exemption from VAT under Article 15 of the Sixth Directive of transactions for export outside of the Community, equivalent transactions and international carriage seeks to respect the principle that the relevant goods or services should be taxed at their place of destination. Every export and equivalent transaction should thus be exempt from VAT in order to ensure that the relevant transaction is taxed only in the place where the relevant products are consumed.

National legislation with limits VAT exemption to full chartering alone makes the benefit of that exemption subject to the size of the vessel used for the chartering, as the same volume of freight may be subject to VAT or exempt depending on whether the volume of freight fills all or only part of the vessel’s capacity. Such a condition deprives the exemption of chartering set out in Article 15(5) of the Sixth Directive of its effectiveness.

In those circumstances, while it is the case that the words used to describe the exemption set out in Article 15(5) of the Sixth Directive must be strictly interpreted, to maintain a particularly strict interpretation of the concept of chartering would lead to misconstruing both the wording and the objective of that provision.

(see paras 29, 31-33, operative part 1)

2. A chartering contract within the meaning of Article 15(5) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 92/111, differs from a contract for the carriage of goods in that it requires one party, the ship-owner, to make available to the other party, the charterer, all or part of the vessel, whereas, in the case of a contract for the carriage of goods, within the meaning of Article 15(13) of the Sixth Directive, the undertaking which the carrier assumes towards the customer relates only to the transport of those goods. It is for the national court to take into account the relevant circumstances in which a chartering transaction took place, to seek its characteristic elements in order to be able to decide if that transaction should be considered as chartering or as a provision of services for the carriage of goods. In particular, that court must take account of the terms of the contract concluded between the parties and the specific nature and content of the service provided in order to determine whether that contract satisfies the conditions of a chartering contract within the meaning of Article 15(5) of the Sixth Directive. Such an assessment of the legal nature of the contract at issue proves necessary, moreover, in order to ensure the correct and straightforward application of the exemptions provided for by the Sixth Directive and to prevent any possible evasion, avoidance or abuse in the implementation of that directive.

(see paras 37-40, operative part 2)

JUDGMENT OF THE COURT (Fourth Chamber)

18 October 2007 (*)

(Sixth VAT Directive – Exemptions – Article 15(5) – The concept of ‘chartering sea-going vessels’ – Compatibility of a national law allowing the exemption for full chartering only)

In Case C?97/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Tribunal Superior de Justicia de Madrid (Spain), made by decision of 23 January 2006, received at the Court on 20 February 2006, in the proceedings

Navicon SA

v

Administración del Estado,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis (Rapporteur), R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– the Spanish Government, by M. Muñoz Pérez, acting as Agent,

– the Belgian Government, by A. Hubert, acting as Agent,

– the Greek Government, by K. Georgiadis and M. Papida, acting as Agents,

– the Commission of the European Communities, by M. Afonso and L. Escobar Guerrero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2007,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15(5) 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 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47) (‘the Sixth Directive’).

2 The request has been made in the course of proceedings between Navicon SA (‘Navicon’), the appellant in the main proceedings, and the Administración del Estado (Spanish tax authority) concerning the refusal of the latter to exempt Navicon from value added tax (‘VAT’) in respect of sums paid under a contract for the partial chartering of Navicon’s vessels.

Legal context

Community legislation

3 Under the title ‘Exemption of exports and like transactions and international transport’ paragraphs (1), (4), (5) and (13) of Article 15 of the Sixth Directive state:

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

1. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

…

4. the supply of goods for the fuelling and provisioning of vessels:

(a) used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

(b) used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships' provisions;

…

5. the supply, modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) and the supply, hiring, repair and maintenance of equipment – including fishing equipment – incorporated or used therein.

…

13. the supply of services, including transport and ancillary transactions, but excluding the supply of services exempted under Article 13, when these are directly connected with the export of goods or import of goods covered by the provisions of Article 7(3) of Article 16(1), Title A'.

National legislation

4 Article 22.1 of Law 37/1992 on value added tax (Ley 37/1992 del Impuesto sobre el Valor Añadido) of 28 December 1992 (BOE No 312 of 29 December 1992, p. 44247) ('VAT Law'), states as follows:

'Exemptions for transactions equated to exports

The following transactions shall be exempt from the tax under the conditions and in the circumstances to be laid down by regulation:

First: the supply, construction, modification, repair, maintenance, full chartering and hiring of the vessels listed below:

(1) Vessels capable of sailing on the high seas used for international maritime shipping in the exercise of commercial activities of transport of goods or passengers against payment, including tourist services or industrial or fishing activities.

The exemption shall, in no circumstances, apply to vessels intended for sporting or recreational activities, or for general private use.'

The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

5 As is apparent from the decision to refer, Navicon and the Compañía Transatlántica Española SA entered into a partial chartering contract under which the former, in return for payment, provided the latter with part of the space on its vessels to transport containers between several ports on the Iberian peninsula and the Canary Islands, which is an area outside of the scope of Community legislation according to the second subparagraph of Article 3(3) of the Sixth Directive. Navicon did not include VAT on the invoices relating to that contract since it believed that the chartering transaction was exempt.

6 However, the Spanish tax authorities, holding that the exemption provided for in Article 22.1 of the VAT Law did not apply, in so far as the contract in question related to partial chartering and

not full chartering, made adjustments for VAT linked to the sums paid under that chartering contract.

7 Navicon then challenged that adjustment before the Tribunal Económico-Administrativo Regional de Madrid (Regional Economic Administrative Court, Madrid), which dismissed its application. Following the decision to dismiss the application it appealed to the referring court.

8 The Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid), holding that the resolution of the dispute before it required an interpretation of the Sixth Directive, decided to stay proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

‘(1) Is the term “chartering” in the exemption provided for in Article 15(5) of the Sixth Directive to be interpreted as including only chartering of the entire capacity of the vessel (full chartering) or as including chartering relating to a part or percentage of the vessel’s capacity (partial chartering)?

(2) Does the Sixth Directive preclude a national law which allows exemption only for full chartering?’

The questions referred for a preliminary ruling

9 By its two questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 15(5) of the Sixth Directive must be interpreted as covering both full chartering and partial chartering of vessels used for navigation on the high seas. In that regard, that court also asks whether that provision precludes a national law, such as that in dispute in the main proceedings, which grants the benefit of the exemption from VAT only in cases of full chartering of such vessels.

Observations submitted to the Court

10 The Spanish and Greek Governments consider that the concept of chartering laid down in Article 15(5) of the Sixth Directive covers only chartering of the entire capacity of the vessels and therefore conclude that the VAT Law complies with that provision. They submit that, according to settled case-law of the Court in that regard, the exemptions laid down in the Sixth Directive should be strictly interpreted as they constitute derogations from the general principle that VAT is levied on all services supplied for consideration by a taxable person.

11 The Spanish Government adds that the purpose of the exemption provided for by that provision is to facilitate the application of VAT in cases of deliveries outside the Community, which implies the exemption of chartering only in cases of international shipping. According to it, the interpretation which best complies with that objective, and which is as strict as possible, consists of granting such an exemption only in the case where there is full chartering of the vessel, that is, when the recipient of the service being supplied is presumed to be using that service in the context of international shipping.

12 The Belgian Government and the Commission of the European Communities contend, by contrast, that the term ‘chartering’ used in Article 15(5) of the Sixth Directive covers both full chartering and partial chartering of sea-going vessels.

13 According to the Belgian Government, it is abundantly clear from the wording of Article 15(5) of the Sixth Directive that the objective of that provision is to exempt the chartering of vessels intended for international shipping from VAT and not to exempt certain kinds of chartering of vessels. In any case, that government recalls that, when a provision of Community law is open to several interpretations, it is the interpretation which is appropriate to ensure the effectiveness of

that provision which should be preferred. In the case in the main proceedings, an interpretation of the concept of chartering limited to full chartering would compromise the effectiveness of Article 15(5), inasmuch as, for the same journey and the same type of cargo, partial chartering would give rise to payment of VAT while, in the case of full chartering, the transaction would be exempt.

14 The Commission contends, as a preliminary point, that it is necessary to apply the criterion of strict interpretation to the provisions relating to VAT exemptions, given that the exemptions relating to vessels and aircraft, provided for in Article 15 of the Sixth Directive, constitute a double exception to the general rules set down by that directive, to the extent that they constitute exemptions and represent an exception to the common system of VAT in the single market.

15 However, according to the Commission, it is clear from the wording of Article 15(5) of the Sixth Directive that that provision refers to both full and partial chartering of sea-going vessels. That provision makes no distinction between those two types of chartering and therefore it does not seem possible for a Member State to give a scope to the exemption at issue that differs from that which follows clearly from the wording of the Directive (see, to that effect, Case C-382/02 *Cimber Air* [2004] ECR I-8379). Moreover, the first sentence of Article 15 of the Sixth Directive does not in any way confer on Member States the power to alter the substantive scope of an exemption, such as defined in that directive.

16 The Commission also takes the view that goods that are exported to a non-member country must be free from all taxes when they leave the territory of the Community, which requires that taxes are not imposed on the chartering service provided, whether the chartering in question is full or partial chartering. Finally, applying the exemption to full chartering alone would mean that the right to an exemption would depend on the size of the vessel carrying out the chartering service, as the same volume of freight would, or would not, be exempted depending on the capacity of the vessel concerned.

17 However, the Commission also considers the possible justifications for the VAT Law. In that regard, it looks at the possibility of reserving to chartering contracts the same tax system as that which applies to contracts for the carriage of goods, laid down in Article 15(13) of the Sixth Directive. The essential objective and the purpose of the contract would, in each case, be the transfer of goods from one place to another. It considers, however, that that assimilation would go against the content and the objective of the Sixth Directive, which conferred a different legal scheme on chartering to that conferred on the carriage of goods.

18 Finally, the Commission submits that it is for the national court to decide, taking account of the terms of the contract between the parties and the specific nature and content of the service provided, whether the contract at issue in the main proceedings has the characteristics of a chartering contract within the meaning of Article 15(5) of the Sixth Directive.

Reply of the Court

19 It is clear from the decision making the reference that Article 22.1 of the VAT Law exempts from tax the full chartering of vessels used for international maritime shipping, and used for commercial activities of carriage of goods against payment. Further, it is common ground, that according to the second subparagraph of Article 3(3) of the Sixth Directive, the Canary Islands are an extra-Community territory and that, under that provision, read together with Article 15(1) thereof, the carriage of goods to those islands is considered as an export for VAT purposes.

20 As regards the exemptions provided for by the Sixth Directive, it should be recalled that these constitute independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the Sixth Directive (see, inter alia, Case

235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 18; Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21, and *Cimber Air*, paragraph 23).

21 That system is based in particular on two principles. First, each supply of goods and services effected for consideration by a taxable person is subject to VAT. Second, in accordance with the principle of fiscal neutrality, economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT (*Cimber Air*, paragraph 24).

22 In light of those principles, such exemptions must be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, to that effect, *SDC*, paragraph 20, *Cimber Air*, paragraph 25, and Case C-445/05 *Haderer* [2007] ECR I-0000, paragraph 18). That requirement of strict interpretation does not, however, mean that the terms used to specify the exemptions should be construed in such a way as to deprive those exemptions of their intended effect (Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 17, and *Haderer*, paragraph 18).

23 It is in light of those criteria of interpretation derived from the case-law mentioned at paragraphs 20 to 22 of the present judgment that the concept of chartering in Article 15(5) of the Sixth Directive should be interpreted.

24 In that regard, it should be stated that Article 15 contains no definition of the concept of ‘chartering’. According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part (see, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21, and Case C-53/05 *Commission* v *Portugal* [2006] ECR I-6215, paragraph 20).

25 It is clear, in the first place, from the wording of Article 15(5) of the Sixth Directive that Member States are to exempt the supply, modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) of that article, particularly those used for navigation on the high seas and for the purposes of commercial activities, as well as the supply, hiring, repair and maintenance of equipment – including fishing equipment – incorporated or used therein.

26 Thus, it must be stated that Article 15(5) makes no distinction between full chartering and partial chartering. That provision merely includes the chartering of vessels used for navigation on the high seas within those cases exempt from VAT laid down in Article 15, without specifying whether such chartering must be full or partial.

27 Moreover, to the extent that Article 22.1 of the VAT Law is based on a specific interpretation of the concept of ‘chartering’, it should be borne in mind that, according to settle case-law, although the introductory sentence of Article 15 of the Sixth Directive states that Member States are to lay down the conditions for exemptions in order to ensure the correct and straightforward application of the exemptions and to prevent any possible evasion, avoidance or abuse, those conditions cannot affect the definition of the subject-matter of the exemptions envisaged (see, by analogy, Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 26, and Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 24).

28 From that point of view, whether a specific transaction is subject to or exempt from VAT cannot depend on its classification in national law (see, inter alia, *Kingscrest Associates and Montecello*, paragraph 25. and *Haderer*, paragraph 25).

29 Secondly, as regards the objective pursued by Article 15 of the Sixth Directive, it should be

stated that this deals with the exemption from VAT of transactions for export outside of the Community, equivalent transactions and international carriage. In the context of international business, such an exemption seeks to respect the principle that the relevant goods or services should be taxed at their place of destination. Every export and equivalent transaction should thus be exempt from VAT in order to ensure that the relevant transaction is taxed only in the place where the relevant products are consumed.

30 In the case in the main proceedings, it follows from Article 22.1 of the VAT Law that only the full chartering of vessels used for navigation on the high seas and for international shipping is exempt from VAT. Therefore, notwithstanding that they may be transactions equivalent to export, that Law does not allow the VAT exemption to apply to partial chartering of those vessels. It follows that levying tax on that type of chartering at the time of such transactions infringes the principle that the relevant goods and services should be taxed at their place of destination and goes against the objective of the exemption scheme set out in Article 15 of the Sixth Directive.

31 It should also be added that, as the referring court states, the VAT law, by limiting VAT exemption to full chartering alone, makes the benefit of that exemption subject to the size of the vessel used for the chartering, as the same volume of freight may be subject to VAT or exempt depending on whether the volume of freight fills all or only part of the vessel's capacity. It must be stated that such a condition deprives the exemption of chartering set out in Article 15(5) of the Sixth Directive of its effectiveness.

32 In those circumstances, while it is the case that the words used to describe the exemption set out in Article 15(5) of the Sixth Directive must be strictly interpreted, to maintain a particularly strict interpretation of the concept of chartering would lead to misconstruing both the wording and the objective of that provision.

33 Therefore, the reply to the questions referred must be that Article 15(5) of the Sixth Directive must be interpreted as covering both full chartering and partial chartering of vessels used for navigation on the high seas. Consequently, that provision precludes national legislation, such as that at issue in the main proceedings, which grants the benefit of the VAT exemption only in the case of full chartering of such vessels.

34 The Commission, however, in its observations submitted to the Court examines the possibility of treating the partial chartering of a vessel as a contract for the carriage of goods, which would allow such chartering to benefit from the exemption reserved for the provision of transport services connected with the export of goods, provided for in Article 15(13) of the Sixth Directive, as long as the goods fulfil the conditions set out in that provision. In that context, and by way of such equivalence, the exemption could be granted to partial chartering of a vessel within the framework of a transaction which is treated as being an export transaction.

35 It must be stated in that regard, concerning exemptions relating to exports, that the Sixth Directive has reserved different legal schemes for those two types of contract, namely chartering contracts and those relating to the provision of transport services. The exemption for chartering vessels used for navigation on the high seas was laid down in Article 15(5) of the Sixth Directive, while the exemption for services relating to the carriage of goods is governed by Article 15(13). It thus follows from the wording of that article that treating those contracts as equivalent, in order to bring them within the same VAT scheme, has no basis in the system of exemptions established by the Sixth Directive.

36 As the Advocate General stated at point 27 of his Opinion, it may be assumed that, if the Community legislature had intended to restrict the concept of chartering vessels used for navigation on the high seas to full chartering alone and to treat partial chartering as a supply of

services relating to the carriage of goods, it would have made that clear in Article 15 of the Sixth Directive.

37 It nevertheless falls to the referring court to take into account the relevant circumstances in which the chartering transaction at issue in the main proceedings took place, to seek its characteristic elements in order to be able to decide if that transaction should be considered as chartering or as a provision of services for the carriage of goods. In particular, that court must take account of the terms of the contract concluded between the parties and the specific nature and content of the service provided in order to determine whether that contract satisfies the conditions of a chartering contract within the meaning of Article 15(5) of the Sixth Directive.

38 In that regard, as the Commission pointed out, a chartering contract differs from a contract for the carriage of goods in that it requires one party, the ship-owner, to make available to the other party, the charterer, all or part of the vessel, whereas, in the case of a contract for the carriage of goods, the undertaking which the carrier assumes towards the customer relates only to the transport of those goods.

39 Such an assessment of the legal nature of the contract at issue in the main proceedings proves necessary, moreover, in order to ensure the correct and straightforward application of the exemptions provided for by the Sixth Directive and to prevent any possible evasion, avoidance or abuse in the implementation of that directive.

40 It follows that it is for the referring court to determine whether the contract in issue in the main proceedings satisfies the conditions of a chartering contract within the meaning of Article 15(5) of the Sixth Directive.

Costs

41 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 (Fourth Chamber) hereby rules:

1. **Article 15(5) 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 92/111/EEC of 14 December 1992, must be interpreted as covering both full chartering and partial chartering of vessels used for navigation on the high seas. Consequently, that provision precludes national legislation, such as that at issue in the main proceedings, which grants the benefit of the exemption from value added tax only in the case of full chartering of such vessels.**

2. **It is for the referring court to determine whether the contract in issue in the main proceedings satisfies the conditions of a chartering contract within the meaning of Article 15(5) of Sixth Directive 77/388, as amended by Directive 92/111.**

[Signatures]

* Language of the case: Spanish.