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Case C-499/10

Vlaamse Oliemaatschappij NV

v

FOD Financiën

(Reference for a preliminary ruling from the
rechtbank van eerste aanleg te Brugge)

(Sixth VAT Directive – Persons liable to pay tax – Third party jointly and severally liable –
Warehousing arrangements other than customs warehousing – Joint and several liability of the
warehouse-keeper of the goods and the taxable person who owns the goods – Good faith or lack
of fault or negligence of the warehouse-keeper)

Summary of the Judgment

*Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax –
Persons liable to pay the tax – The right of Member States to hold jointly and severally liable for
the tax a person other than the person liable to pay the tax (Article 21(3) of the Sixth Directive)*

(Council Directive 77/388, Art. 21(3))

Article 21(3) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2001/115, must be interpreted as not authorising the Member States to provide that a warehouse-keeper other than a customs warehouse-keeper is jointly and severally liable for the value added tax which is owing on a supply of goods made for valuable consideration, and released from the warehouse, by the owner of the goods who is liable for the tax on those goods, even where the warehouse-keeper acts in good faith or where no fault or negligence can be imputed to him.

National measures which bring about, de facto, a system of strict joint and several liability go beyond what is necessary to preserve the public exchequer's rights. Imposing responsibility for paying value added tax on a person other than the person liable to pay that tax, even where that person is an authorised tax warehouse-keeper, without allowing him to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay the tax must, therefore, be considered contrary to the principle of proportionality. It would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever.

The fact that the person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that person can be obliged to account for the value added tax owed.

(see paras 24, 26, 28, operative part)

JUDGMENT OF THE COURT (Seventh Chamber)

21 December 2011 (*)

(Sixth VAT Directive – Persons liable to pay tax – Third party jointly and severally liable – Warehousing arrangements other than customs warehousing – Joint and several liability of the warehouse-keeper of the goods and the taxable person who owns the goods – Good faith or lack of fault or negligence of the warehouse-keeper)

In Case C-499/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the rechtbank van eerste aanleg te Brugge (Belgium), made by decision of 13 October 2010, received at the Court on 19 October 2010, in the proceedings

Vlaamse Oliemaatschappij NV

v

FOD Financiën,

THE COURT (Seventh Chamber),

composed of J. Malenovský, President of the Chamber, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: V. Trstenjak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 September 2011,

after considering the observations submitted on behalf of:

- Vlaamse Oliemaatschappij NV, by T. Leeuwerck, advocaat,
- the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,
- the European Commission, by L. Lozano Palacios and B. Burggraaf, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 21(3) 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 2001/115/EC of 20 December 2001 (OJ 2002 L 15, p. 24) ('the Sixth Directive').

2 The reference has been made in proceedings between Vlaamse Oliemaatschappij NV ('VOM') and the FOD Financiën (Federal Public Finance Service) concerning the payment of value added tax ('VAT') by that company for fuels supplied, and released from its warehouse, by one of its customers.

Legal context

European Union law

3 Pursuant to the Article 16(1)B(e) of the Sixth Directive, in the version resulting from the first indent of Article 28c(E)(1) of the directive, Member States may choose not to apply VAT, under certain conditions, to supplies of goods which are intended to be placed under warehousing arrangements other than customs warehousing.

4 Under the second subparagraph of Article 16(1) of Directive 77/388, in the version resulting from the first indent of Article 28c(E)(1) of the directive, the person liable to pay the tax due in accordance with the first subparagraph of Article 16(1) is the person who causes the goods to cease to be covered by the arrangements or the situations listed in that paragraph, by way of derogation from the first subparagraph of Article 21(1)(a) of that directive.

5 Under the heading 'Persons liable to pay tax to the authorities', Article 21 of the Sixth Directive, in the version resulting from Article 28g of the directive, provides:

'1. Under the internal system, the following shall be liable to pay value added tax:

(a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b) and (c).

Where the taxable supply of goods or of services is effected by a taxable person who is not established within the territory of the country, Member States may, under conditions determined by them, lay down that the person liable to pay tax is the person for whom the taxable supply of goods or of services is carried out;

(b) taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for value added tax purposes within the territory of the country to whom services covered by Article 28b(C), (D), (E) and (F) are supplied, if the services are carried out by a taxable person not established within the territory of the country;

(c) the person to whom the supply of goods is made when the following conditions are met:

– the taxable operation is a supply of goods made under the conditions laid down in Article 28c(E)(3),

– the person to whom the supply of goods is made is another taxable person or a non-taxable legal person identified for the purposes of value added tax within the territory of the country,

– the invoice issued by the taxable person not established within the territory of the country conforms to Article 22(3).

However, Member States may provide a derogation from this obligation, where the taxable person who is not established within the territory of the country has appointed a tax representative in that country;

- (d) any person who mentions the value added tax on an invoice;
- (e) any person effecting a taxable intra-Community acquisition of goods.

2. By way of derogation from the provisions of paragraph 1:

(a) where the person liable to pay tax in accordance with the provisions of paragraph 1 is a taxable person who is not established within the territory of the country, Member States may allow him to appoint a tax representative as the person liable to pay tax. This option shall be subject to conditions and procedures laid down by each Member State;

b) where the taxable transaction is effected by a taxable person who is not established within the territory of the country and no legal instrument exists, with the country in which that taxable person is established or has his seat, relating to mutual assistance similar in scope to that laid down by Directives 76/308/EEC and 77/799/EEC and by Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT), Member States may take steps to provide that the person liable for payment of the tax shall be a tax representative appointed by the non-established taxable person.

3. In the situations referred to in paragraphs 1 and 2, Member States may provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax.

4. On importation, value added tax shall be payable by the person or persons designated or accepted as being liable by the Member State into which the goods are imported.'

6 Article 4(b) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) defines a 'tax warehouse' as 'a place where goods subject to excise duty are produced, processed, held, received or dispatched under duty-suspension arrangements by an authorised warehouse-keeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located'.

National legislation

7 Article 51a(3) of the Belgian Value Added Tax Code provides:

'In the case of warehousing arrangements other than customs warehousing, the warehouse-keeper, the person responsible for the transport of the goods from the warehouse as well as, where applicable, his principal, are jointly and severally liable towards the State for the payment of the tax, together with the persons who are liable for the tax... '

The dispute in the main proceedings and the question referred for a preliminary ruling

8 VOM is a service provider which unloads, stores in warehouses and transfers onto lorries

petroleum products arriving by boat for its customers. The customers store the goods in those warehouses until they are sold to the final customer, mainly retail petrol filling stations. For those services, VOM invoices a 'service fee' which depends on the number of litres handled.

9 VOM therefore operates a 'tax warehouse' within the meaning of Article 4(b) of Directive 92/12. In that capacity as warehouse-keeper, it has been the holder, since 7 September 1999, of a permit as a warehouse-keeper other than a customs warehouse-keeper for the storage of mineral oils.

10 Pursuant to such an authorisation, goods deposited in that warehouse, in accordance with warehousing arrangements other than customs warehousing, are placed under suspensive VAT arrangements. When the goods are removed from the warehouse and either are no longer under warehousing arrangements other than customs warehousing, or are supplied for valuable consideration, VAT becomes chargeable in respect of those goods.

11 Ghebra NV ('Ghebra') was a fuel wholesaler and stored its petroleum products in VOM's warehouse. On 20 June 2003 Ghebra was declared insolvent.

12 Following an audit by the tax authorities, a report was drawn up dated 7 February 2006. According to that report, fuel had been supplied for valuable consideration, and released from VOM's warehouse, by Ghebra during March and April 2003. Since those supplies put an end to warehousing arrangements other than customs warehousing, they were subject to VAT and the amount due was EUR 2 133 005.

13 After being informed by Ghebra's trustee in bankruptcy that the Belgian State would not be paid the VAT owed, because there were insufficient assets, the tax authorities issued, on 11 April 2006, an order for recovery against VOM under Article 51a(3) of the Belgian VAT Code.

14 On 31 May 2006 VOM lodged an objection against the order for recovery before the rechtbank van eerste aanleg te Brugge.

15 In support of its action, VOM, submits, inter alia, that the joint and several liability of the warehouse-keeper for the VAT owed by the warehouse user under Article 51a(3) of the Belgian VAT Code is contrary to the general principles of legal certainty and proportionality, which form part of the European Union legal order, because it applies irrespective of whether or not the warehouse-keeper acted in good faith. It adds, in that regard, that the warehouse-keeper plays a passive role in the VAT arrangements applicable to warehouses, since he merely makes his warehouse available to his customers to allow goods to be stored and has no legal or fiscal means at his disposal to monitor or enforce the effective payment of VAT by his customers. Relying on the Court's case-law, VOM considers that, by failing to take into account whether or not a person other than the person initially liable to pay a tax was aware that tax was due in holding him jointly and severally liable for that tax, and therefore excluding any criterion of good faith from the conditions under which a person may be held jointly and severally liable for the tax, the national legislation exceeds the limits of what is appropriate and necessary for the attainment of the objective that it pursues.

16 The FOD Financiën considers that Article 51a(3) of the Belgian VAT Code complies with the principle of proportionality, that it is for the national court to monitor compliance with that principle and that joint and several liability is an appropriate and proportionate measure in the petroleum products sector.

17 In those circumstances, the rechtbank van eerste aanleg te Brugge, considering it necessary to ascertain whether Article 51a(3) of the Belgian VAT Code is compatible with

European Union law and, in particular, the principles of legal certainty and proportionality, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does [Article 21(3) of the Sixth Directive] in conjunction with [the Article 16(1)B(e) and the second subparagraph of Article 16(1) of that directive], authorise the Member States to provide that a warehouse-keeper other than a customs warehouse-keeper is jointly and severally liable, unconditionally, for the tax which is owing on a supply of goods made for valuable consideration by the owner of the goods who is liable for the tax on those goods, even where the warehouse-keeper acts in good faith or where no fault or negligence can be imputed to him...’

The question referred for a preliminary ruling

18 By its question, the referring court asks, in essence, whether Article 21(3) of the Sixth Directive must be interpreted as authorising the Member States to provide that a warehouse-keeper other than a customs warehouse-keeper is jointly and severally liable for the VAT owing on a supply of goods made for valuable consideration, and released from the warehouse, by the owner of the goods who is liable for the VAT on those goods, even where the warehouse-keeper acts in good faith or where no fault or negligence can be imputed to him.

19 It should be recalled that Article 21(3) of the Sixth Directive permits, as a rule, Member States to enact measures under which a person is to be jointly and severally liable to pay a sum in respect of VAT payable by another person made liable by one of the provisions of Article 21(1) and (2) (see Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-4191, paragraph 28).

20 However, in the exercise of the powers conferred on them by European Union directives, Member States must respect the general principles of law that form part of the European Union legal order, which include, in particular, the principles of legal certainty and proportionality (see, inter alia, *Federation of Technological Industries and Others*, paragraph 29, and Case C-271/06 *Netto Supermarkt* [2008] ECR I-771, paragraph 18).

21 As regards more particularly the principle of proportionality, the Court has already held that, in accordance with that principle, the Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant European Union legislation (see, inter alia, Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraph 52, and *Netto Supermarkt*, paragraph 19).

22 Therefore, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, such measures must not go further than is necessary for that purpose (see, inter alia, *Federation of Technological Industries and Others*, paragraph 30, and *Netto Supermarkt*, paragraph 20).

23 In that regard, the national provision at issue in the main proceedings provides that, in warehousing arrangements other than customs warehousing, the warehouse-keeper of the goods, the person responsible for the transport of the goods from the warehouse as well as, where applicable, his principal are jointly and severally liable towards the State for the payment of the tax, together with the persons who are liable for the tax. Therefore, pursuant to that provision, a warehouse-keeper other than a customs warehouse-keeper is jointly and severally liable to pay VAT with the person initially liable to pay it, that is to say the warehouse-keeper's customer. That joint and several obligation is worded unconditionally, with the result that it applies to the warehouse-keeper even where he acts in good faith or no fault or negligence can be imputed to him.

24 The Court has already held that national measures which bring about, *de facto*, a system of strict joint and several liability go beyond what is necessary to preserve the public exchequer's rights (see *Federation of Technological Industries and Others*, paragraph 32). Imposing responsibility for paying VAT on a person other than the person liable to pay that tax, even where that person is an authorised tax warehouse-keeper bound by the specific obligations referred to in Directive 92/12, without allowing him to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay the tax must, therefore, be considered contrary to the principle of proportionality. It would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever (see, to that effect, *Netto Supermarkt*, paragraph 23).

25 On the other hand, it is not contrary to European Union law to require the person other than the personal liable to pay the tax to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see, to that effect, *Federation of Technological Industries and Others*, paragraph 33; *Teleos and Others*, paragraph 65; and *Netto Supermarkt*, paragraph 24).

26 Accordingly, the fact that the person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that person can be obliged to account for the VAT owed (see *Teleos and Others*, paragraph 66, and *Netto Supermarkt*, paragraph 25).

27 It is for the referring court to assess whether those circumstances are present in the case in the main proceedings.

28 In the light of all of the foregoing considerations, the answer to the question referred is that Article 21(3) of the Sixth Directive must be interpreted as not authorising the Member States to provide that a warehouse-keeper other than a customs warehouse-keeper is jointly and severally liable for the VAT which is owing on a supply of goods made for valuable consideration, and released from the warehouse, by the owner of the goods who is liable for the tax on those goods, even where the warehouse-keeper acts in good faith or where no fault or negligence can be imputed to him.

Costs

29 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 (Seventh Chamber) hereby rules:

Article 21(3) 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 2001/115/EC of 20 December 2001, must be interpreted as not authorising the Member States to provide that a warehouse-keeper other than a customs warehouse-keeper is jointly and severally liable for the value added tax which is owing on a supply of goods made for valuable consideration, and released from the warehouse, by the owner of the goods who is liable for the tax on those goods, even where the warehouse-keeper acts in good faith or where no fault or negligence can be imputed to him.

[Signatures]

* Language of the case: Dutch.