JUDGMENT OF THE COURT (Eighth Chamber)

13 March 2014 (*)

(VAT – Special scheme for travel agents – Transactions carried out outside the European Union – Sixth Council Directive 77/388/EEC – Article 28(3) – Directive 2006/112/EC – Article 370 – ‘Standstill’ clauses – Amendment of national legislation during the transposition period)

In Case C?599/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank van eerste aanleg te Brugge (Belgium), made by decision of 24 October 2012, received at the Court on 20 December 2012, in the proceedings

Jetair NV,

BTW-eenheid BTWE Travel4you

v

FOD Financiën,

THE COURT (Eighth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, C. Toader and E. Jaraši?nas, Judges

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Jetair NV and BTW-eenheid BTWE Travel4you, by H. Vandebergh, advocaat,

– the Belgian Government, by M. Jacobs and J.?C. Halleux, acting as Agents,

– the European Commission, by W. Roels, C. Soulay and L. Lozano Palacios, acting as Agents,

– the Council of the European Union, by A.?M. Colaert and E. Chatziioakeimidou, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the ‘standstill’ clause in

Article 28(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 L 145, p. 1, 'the Sixth Directive') and Article 370 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, p. 1, 'the VAT Directive'), the interpretation of Articles 153 and 309 of the VAT Directive and Articles 43 EC and 56 EC and the validity of Article 370 of the VAT Directive.

2 The request has been made in two sets of proceedings between, on the one hand, Jetair NV ('Jetair') and, on the other hand, BTW-eenheid BTWE Travel4you ('Travel4you'), a group formed by several companies regarded as a single taxable person for the purposes of value added tax ('VAT'), and FOD Financiën (federal public finance service), concerning the refusal of the application for refund of value added tax made by the applicants in respect of journeys outside the European Union.

Legal context

European Union law

The Sixth Directive

3 Article 1 of the Sixth Directive provided:

'Member States shall modify their present [VAT] systems in accordance with the following Articles.

They shall adopt the necessary laws, regulations and administrative provisions so that the systems as modified enter into force at the earliest opportunity and by 1 January 1978 at the latest.'

4 Article 26(1) and (3) of the Sixth Directive read as follows:

'1. Member States shall apply [VAT] to the operations of travel agents in accordance with the provisions of this Article, where the travel agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. This Article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11A(3)(c). ...

...

3. If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the travel agent's service shall be treated as an exempted intermediary activity under Article 15(14). ...'

5 Article 28(3)(a) and (4) of the Sixth Directive, which appear in Title XVI entitled 'Transitional provisions' provided:

'3. During the transitional period referred to in paragraph 4, Member States may:

(a) continue to subject to tax the transactions exempt under [Article 15] set out in Annex E to this Directive;

…

4. The transitional period shall last initially for five years as from 1 January 1978. ...'

6 The transactions referred to in Article 15(14) of the Sixth Directive and listed in Annex E thereto included 'the services of travel agents referred to in Article 26, and those of travel agents

acting in the name and on account of the traveller, for journeys outside the Community'.

The VAT Directive

7 Article 153 of the VAT Directive provides:

'Member States shall exempt the supply of services by intermediaries, acting in the name and on behalf of another person, where they take part in the transactions referred to in Chapters 6, 7 and 8, or of transactions carried out outside the Community.

...'

8 Article 306(1) of the VAT Directive, which appears under Title XII in Chapter 3 entitled 'Special scheme for travel agents' provides:

'Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.'

9 Article 309 of the VAT Directive is worded as follows:

'If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the supply of services carried out by the travel agent shall be treated as an intermediary activity exempted pursuant to Article 153.

...'

10 Article 370 of the VAT Directive provides:

'Member States which, at 1 January 1978, taxed the transactions listed in Annex X, Part A, may continue to tax those transactions.'

11 Annex X to that directive, in Part A entitled 'Transactions which Member States may continue to tax', provides in paragraph 4:

'the supply of the services of travel agents, as referred to in Article 306, and those of travel agents acting in the name and on behalf of the traveller, in relation to journeys outside the Community'.

Belgian law

12 It is apparent from the order for reference and from the documents submitted to the Court that the relevant Belgian law is the code de la taxe sur la valeur ajoutée (Belgian value added tax code), as introduced by the Law of 3 July 1969 (*Moniteur belge* of 17 July 1969, p. 7046), in the version in force at the material time ('the VAT code').

13 It is common ground that, before 1 December 1977, the services provided by travel agents consisting in organising journeys outside the European Union were exempt.

14 The VAT code was amended by a law of 29 November 1977, with effect from 1 December 1977, which made those services subject to VAT.

15 It is also apparent from the documents submitted to the Court that the VAT code was again amended by a Royal Decree of 28 December 1999, with effect from 1 January 2000. Under that decree, the services of travel agents relating to journeys outside the European Union are no longer treated as an intermediary activity. Nevertheless, those transactions continued to be subject to VAT.

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

16 Jetair is a Belgian company, subject to VAT in respect of its activity as a travel agent. On 1 February 2009, it joined the group Travel4you, which also includes six other companies carrying out that activity.

17 Jetair and Travel4you organise holiday journeys, for the purposes of which they have recourse to the services of others, namely hotels and airlines.

18 Taking the view that no VAT is payable in respect of journeys outside the European Union, each of the applicants claimed back the VAT that was demanded from them in respect of such journeys.

19 The first claim related to VAT payable on journeys organised during the period covering the years 2001 to 2006 and included in a VAT return for the month of September 2007. The VAT inspection office in Ostend, having disputed the amounts claimed, made a deduction of approximately EUR 55 700 000 and recorded infringements.

20 The second claim related to VAT payable on journeys organised during the period beginning in 2007 and ending in January 2010 and included in a VAT return for the month of March 2010. The VAT inspection office in Ostend, disputed the amounts claimed, made a deduction of approximately EUR 37 600 000 and recorded infringements.

21 Jetair and the members of Travel4you filed, on 21 December and 24 October 2011 respectively, an application with the Rechtbank van eerste aanleg te Brugge (Court of First Instance, Bruges), which joined the two cases.

22 Before the national court, the applicants argued that the transitional provision in Article 28(3) of the Sixth Directive did not authorise the Belgian legislature to amend its legislation in a manner which is contrary to the directive immediately before the date when that directive entered into force. They argued that, under Article 26(3) thereof, now reproduced in Article 309 of the VAT Directive, where the transactions for which the travel agent uses other taxable persons are performed by such persons outside the European Union, the service of the travel agent should be exempt.

23 Since FOD Financiën argued, on the other hand, that Belgium had been entitled, under Article 28(3) of the Sixth Directive, to decide to tax such transactions, the referring court had doubts as to the answer to be given in the main proceedings.

24 In those circumstances, the Rechtbank van eerste aanleg te Brugge decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Was Belgium entitled to amend its legislation by taxing an exempt service – in this case, journeys outside the European Union – at a point in time (1 December 1977) just before the introduction of the Sixth VAT Directive (1 January 1978) and thus circumvent the standstill provision in Article 28(3) of the Sixth Directive (now Article 370 of the [VAT] Directive), which

provides that the journeys referred to may continue to be taxed only if they were already taxed prior to the adoption of the Sixth Directive?

(2) Should Belgium have refrained from taxing journeys outside the European Union as of 13 June 1977 (date of publication of the Sixth Directive)?

(3) Is Belgium in breach of Article 309 of the [VAT] Directive by not treating travel agents, as regards their services outside the [European Union], as intermediaries and continuing nevertheless to tax those services?

(4) Do Articles 309, 153 and 370 of, and Annex X to, the [VAT] Directive infringe the general principles of Community law, the principles of equality and proportionality and the provisions concerning the free movement of persons, goods and services, inter alia, Articles 43 and 56 of the EC Treaty, by giving Member States the right to choose whether or not to tax services relating to journeys outside [the European Union]?

(5) Is it contrary to the principles of Community law, in particular the principles of equality and proportionality and the principle of fiscal neutrality with regard to VAT, for the Belgian State, by Royal Decree of 28 November 1999, to have made only travel agents, but not intermediaries, taxable with regard to journeys outside the European Union?'

The questions referred

The first and second questions

25 It should be noted at the outset that, according to Article 191(2) of the EEC Treaty, applicable when the Sixth Directive was adopted, directives are to be notified to those to whom they are addressed and shall take effect upon such notification. Accordingly, it is not the date of publication but the date of notification of the Sixth Directive to the Member State concerned that was relevant to determine the beginning of the period for transposition of that directive.

26 It should also be pointed out that the legislative amendment at issue, adopted on 1 December 1977, was made between the date of notification of the Sixth Directive to the Kingdom of Belgium, on 23 May 1977, and the date on which that directive should have been transposed in that Member State, in accordance with Article 1 of that directive, namely on 1 January 1978. Consequently, that change took place during the transposition period of the Sixth Directive in the Member State concerned.

27 Accordingly, by its first two questions, which it is appropriate to examine together, the referring court asks, essentially, whether Article 28(3) of the Sixth Directive and Article 370 of the VAT Directive preclude the introduction by a Member State before 1 January 1978, during the transposition period of the Sixth Directive, of a provision that amends its existing legislation by imposing VAT on transactions of travel agents relating to journeys outside the European Union.

28 It is common ground that, according to the legislation at issue in the main proceedings, until 1 December 1977, the services of travel agents relating to journeys outside the European Union were exempt and that they were taxed from that date, even though the special scheme for travel agents established by the Sixth Directive provides in Article 26(3) that those services are exempt.

29 However, Article 28(3) of the Sixth Directive introduced a standstill clause according to which Member States may, during the period referred to in Article 28(4) of the Sixth Directive, continue to subject to tax the transactions exempt under Article 15 of the Sixth Directive and set out in Annex E to that directive.

30 The period in question, of a transitional nature and initially set at five years from 1 January 1978, continued beyond that limit in the absence of any intervention on the part of the Council of the European Union.

31 It follows from the wording of Article 28(3) and (4) of the Sixth Directive, read in conjunction with Article 15 of and Annex E to that directive, that the European Union legislature has granted the right to derogate from the obligation to exempt the services referred to in Article 26(3) of that directive to Member States whose laws provided for the taxation of those services before 1 January 1978.

32 That interpretation is supported by Article 370 of the VAT Directive, which essentially reproduced the terms of Article 28(3) of the Sixth Directive by providing that Member States which, on 1 January 1978, taxed the transactions listed in Part A of Annex X to the VAT Directive, may continue to tax those transactions. Point 4 of Part A of Annex X refers to the supply of the services of travel agents acting in the name and on behalf of travellers in relation to journeys outside the European Union.

33 According to the applicants, Member States could continue to tax the transactions at issue where, under national legislation, those transactions were already subject to VAT before 1 January 1978. By contrast, relying on the judgment in Case C?129/96 *Inter-Environnement Wallonie* [1997] ECR I?7411, paragraph 45, the applicants consider that that option did not allow those Member States to amend their legislation, during the period for transposition of the Sixth Directive, by providing for the taxation of those transactions.

34 According to the Commission, on the other hand, the legislative amendment in question is not contrary to the Sixth Directive read in the light of *Inter-Environnement Wallonie*, taking into account the express provisions of that directive. It states that the exemption for travel agents was inserted by the European Union legislature specifically to accommodate a concern raised by the Kingdom of Belgium.

35 It should be noted that, according to settled case-law, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (see, inter alia, *Inter-Environnement Wallonie*, paragraph 45 and Case C?212/04 *Adeneler and Others* [2006] ECR I?6057, paragraph 121).

36 As regards the Sixth Directive, it is important, therefore, to determine whether, during the period for transposition of that directive, a measure taken by a Member State, consisting of amending national legislation by providing for taxation of the transactions at issue, was liable seriously to compromise the attainment of the result prescribed by that directive.

37 In that regard, as noted in paragraph 31 of the present judgment, if Member States taxed the transactions at issue on 1 January 1978, they could continue to do so after that date. As the Sixth Directive expressly set the date of 1 January 1978 as the starting point for the possible retention of a tax measure, it cannot be considered that a law providing for taxation of such transactions adopted before that date, during the period for transposition of that directive, was liable seriously to compromise the attainment of the result prescribed by that directive.

38 The answer to the first two questions is therefore that Article 28(3) of the Sixth Directive and Article 370 of the VAT Directive do not preclude the introduction by a Member State before 1 January 1978, during the transposition period of the Sixth Directive, of a provision that amends its existing legislation by imposing VAT on the transactions of travel agents relating to journeys outside the European Union.

The third question

39 By its third question, the referring court asks, in essence, whether a Member State is in breach of Article 309 of the VAT Directive by not treating the services of travel agents as exempt intermediary activities where those services relate to journeys made outside of the European Union and by imposing VAT on those services.

40 Article 309 of the VAT Directive, which is part of the chapter on the special scheme for travel agents set out in Articles 306 to 310 of that directive and the scope of which is defined in Article 306 thereof, provides for the exemption of certain services carried out by the travel agent, namely those supplied in the context of journeys outside of the European Union, which are treated as an intermediary activity exempted pursuant to Article 153 of that directive.

41 As is apparent from paragraph 32 of the present judgment, Article 370 of the VAT Directive, however, allows an exception to this provision by granting Member States the option of taxing the transactions at issue if they were taxed on 1 January 1978.

42 It follows that if a Member State fulfils that condition, it is not obliged to apply the provisions of Article 309 of the VAT Directive.

43 The answer to the third question must therefore be that a Member State is not in breach of Article 309 of the VAT Directive by not treating the services of travel agents as exempt intermediary activities where those services relate to journeys made outside of the European Union and by imposing VAT on those services, if it imposed VAT on those services on 1 January 1978.

The fourth question

44 By its fourth question, the referring court asks, in essence, whether Article 370 of the VAT Directive, read in conjunction with point 4 of Part A of Annex X to that directive, infringes European Union law, in particular the general principles of law, the principles of equal treatment and proportionality and the provisions relating to the fundamental freedoms, by giving Member States the right to choose whether or not to tax services relating to journeys outside the European Union.

45 As is apparent from the answer to the third question, Article 370, read in conjunction with point 4 of Part A of Annex X, allows Member States to choose whether or not to tax services of travel agents that relate to transactions outside the European Union, if they taxed those services on 1 January 1978.

46 It is true that, in granting such an option to Member States, that article introduces a system

that differs between Member States that make use of it by taxing the services in question and those that apply the rules laid down in Article 309 of the VAT Directive by exempting those services.

47 However, it is an option granted by way of derogation, subject to fulfilment of the conditions provided in that article.

48 As the Court has previously held, the retention of that derogation reflects the gradual and still partial harmonisation of national VAT legislation (see, to that effect, Case C?240/05 *Eurodental* [2006] ECR I?11479, paragraph 50). The harmonisation envisaged has not yet been achieved in so far as Article 28(3)(a) of the Sixth Directive and Article 370 of the VAT Directive authorised the Member States to retain certain provisions of their national legislation existing on 1 January 1978 which would, without those authorisations, be incompatible with those directives (see, to that effect, with regard to the Sixth Directive, *Eurodental*, paragraph 51).

49 It is for the European Union legislature to establish the definitive system of exemptions from VAT and thereby to bring about the progressive harmonisation of national VAT laws (see Case C?36/99 *Idéal tourisme* [2000] ECR I?6049, paragraph 39).

50 As long as the European Union legislature has not established that definitive system and the Member States may retain their existing legislation, it must be accepted that differences may exist between those Member States without those differences being contrary to European Union law.

51 Consequently, the answer to the fourth question is that Article 370 of the VAT Directive, read in conjunction with point 4 of Part A of Annex X to that directive, does not infringe European Union law by granting Member States the option to continue to tax the supply of the services of travel agents in relation to journeys outside the European Union.

The fifth question

52 By its fifth question, the referring court asks, in essence, whether a Member State infringes European Union law, in particular the principles of equality, proportionality and fiscal neutrality, by treating travel agents, within the meaning of Article 26(1) of the Sixth Directive and Article 306 of the VAT Directive, differently from intermediaries and by laying down a rule, such as the Royal Decree of 28 November 1999, under which only the services of travel agents, but not those of intermediaries, are taxable with regard to journeys outside the European Union.

53 According to settled case-law, the principle of equal treatment, of which the principle of fiscal neutrality is the reflection in matters relating to VAT, requires similar situations not to be treated differently unless differentiation is objectively justified (see, in particular, Case C?309/06 *Marks & Spencer* [2008] ECR I?2283, paragraphs 49 and 51, and Case C?19/12 *Efir* [2013] ECR, paragraph 35).

54 In that regard, it should be noted that the travel agents covered by the special VAT scheme are defined in Article 26(1) of the Sixth Directive and Article 306 of the VAT Directive as those who deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. Those provisions expressly exclude from the special scheme travel agents who act solely as intermediaries.

55 It is apparent from those provisions that the European Union legislature considered that those two categories of travel agents were not in a comparable situation. The Court has previously pointed out that what characterises the activity of travel agents covered by the Sixth Directive is that they are economic operators who organise travel or tour packages in their own name and

entrust other taxable persons with the supply of the services generally associated with that kind of activity (see Case C?94/97 *Madgett and Baldwin* [1998] ECR I?6229, paragraph 23).

56 It follows that the national legislature does not infringe European Union law and, in particular, does not contravene the principle of equal treatment or the principle of neutrality by treating those two categories of operators differently.

57 As regards the principle of proportionality, it is sufficient to note that no evidence capable of substantiating a breach of that principle has been submitted.

58 The answer to the fifth question is therefore that a Member State does not infringe European Union law, in particular the principles of equality, proportionality and fiscal neutrality, by treating travel agents, within the meaning of Article 26(1) of the Sixth Directive and Article 306 of the VAT Directive, differently from intermediaries and by laying down a rule, such as the Royal Decree of 28 November 1999, under which only the services of travel agents, but not those of intermediaries, are taxable with regard to journeys outside the European Union.

Costs

59 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 (Eighth Chamber) hereby rules:

1. **Article 28(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 and Article 370 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax do not preclude the introduction by a Member State before 1 January 1978, during the transposition period of Sixth Directive 77/388, of a provision that amends its existing legislation by imposing VAT on the transactions of travel agents relating to journeys outside the European Union.**

2. **A Member State is not in breach of Article 309 of Directive 2006/112 by not treating the services of travel agents as exempt intermediary activities where those services relate to journeys made outside of the European Union and by imposing VAT on those services, if it imposed VAT on those services on 1 January 1978.**

3. **Article 370 of Directive 2006/112, read in conjunction with point 4 of Part A of Annex X to that directive, does not infringe European Union law by granting Member States the option to continue to tax the supply of the services of travel agents in relation to journeys outside the European Union.**

4. **A Member State does not infringe European Union law, in particular the principles of equality, proportionality and fiscal neutrality, by treating travel agents, within the meaning of Article 26(1) of Sixth Directive 77/388 and Article 306 of Directive 2006/112, differently from intermediaries and by laying down a rule, such as the Royal Decree of 28 November 1999, under which only the services of travel agents, but not those of intermediaries, are taxable with regard to journeys outside the European Union.**

[Signatures]

* Language of the case: Dutch.