JUDGMENT OF THE COURT (Sixth Chamber)
2 August 1993 *

In Case C-111/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München (Germany) for a preliminary ruling in the proceedings pending before that court between

Wilfried Lange

and

Finanzamt Fürstenfeldbruck,

on the interpretation of the Sixth Council Directive of 17 May 1977 (77/388/EEC) 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 (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. F. Mancini, F. A. Schockweiler, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of the Commission of the European Communities by Henri Étienne, Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 1 April 1993,

* Language of the case: German.

gives the following

Judgment

1 By order of 23 March 1992, received at the Court on 7 April 1992, the Finanzgericht München (Finance Court, Munich) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the Sixth Council Directive of 17 May 1977 (77/388/EEC) 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 the course of proceedings between Wilfried Lange, operator of the PPC Purchasing Pool Company ('the PPC') and the Finanzamt Fürstenfeldbruck ('the Finanzamt') relating to a decision of the latter not to exempt certain exports of computer systems (hard-and software) from value added tax ('VAT').

3 According to the order for reference, during the years 1985 and 1986 Mr Lange, in order to be able to export computer systems, applied through the PPC for export permits in accordance with Paragraph 17(1) of the Aussenwirtschaftsverordnung (the Foreign Trade Regulation, 'the AWV'), as amended on 3 August 1981 (BGBl. I, p. 853), and on 1 July 1985 by the 58th Regulation amending the AWV (BGBl. I, pp. 1 258 and 1 313). The applications stated that the final destination of the goods would be either Pakistan or Israel.

4 The Bundesamt für Gewerbliche Wirtschaft (Federal Office of Commerce) granted the export permits requested for those destinations. However, the goods were dispatched to Vienna, to Belgrade, or to Belgrade via Vienna, and were ultimately collected by local carriers and dispatched to Bulgaria, Hungary, the USSR and Czechoslovakia.

5 Mr Lange also obtained the exemption and deduction requested in his declarations for turnover tax for 1985 and 1986, that is, the exemption of those transactions on the basis of Paragraph 4(1) of the Umsatzsteuergesetz 1980 (the Turnover Tax Law, 'the UStG') and the deduction of the input tax levied on the goods supplied, on the basis of Paragraph 15(1)(1) and (3)(1)(a) of the UStG.

6 The Finanzamt investigated Mr Lange's tax situation and decided that the transactions declared exempt should be subject to turnover tax on the grounds *inter alia* that exports to the countries which were the final destination of the goods were prohibited. In that respect, the Finanzamt relied on the combined provisions of Paragraph 7(1) of the Aussenwirtschaftsgesetz (the Foreign Trade Law, 'the AWG', BGBl. I, 1961, p. 481) and Paragraph 5(1) of the AWV, according to which authorization is required for the export of the goods included in the export list (Annex AL to the AWV). According to Paragraphs 33(1) and 34(1) in conjunction with Paragraph 70(1)(1) of the AWV, breach of those provisions relating to authorization is a criminal offence.

7 Mr Lange brought an action challenging that decision of the Finanzamt before the Finanzgericht München (Finance Court, Munich). In his application, he maintained that, in accordance with Paragraphs 4(1) and 6(1)(1) of the UStG, it was sufficient for exemption that the goods had been dispatched abroad. Breach of other legal provisions could not justify the refusal of tax exemption, because the UStG referred only to the act of exportation, without any value judgment as to the transaction. Furthermore, Mr Lange maintained that it could not be expected that the whereabouts of the goods should be monitored for several years after delivery abroad.

8 The Finanzgericht, considering that the outcome of the proceedings depended on the interpretation of the Treaty and the Sixth Directive, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 15(1) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover

taxes — Common system of value added tax: uniform basis of assessment — to be interpreted as meaning that the tax exemption for exports provided for therein is to be refused if, in breach of national provisions making exports subject to authorization, goods are supplied to countries for which no authorization would be available in any Member State of the European Communities as a result of the existence of national embargoes?

2. If Question 1 is answered in the affirmative;

May tax exemptions be refused solely on the basis of the existence of an objective breach of national provisions concerning authorization or must it be shown that the exporter was himself aware of the breach in respect of each supply?'

9 Reference is made to the Report of the Judge-Rapporteur for a fuller account of the facts, the Community and national provisions at issue, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 Before an answer is given to the questions referred to the Court of Justice by the national court, it must first be considered whether exports which are prohibited under the relevant national provisions because of their country of destination and which concern goods such as those in the main proceedings fall within the scope of the Sixth Directive.

The scope of the Sixth Directive

11 In Case 294/82 *Senta Einberger* v *Hauptzollamt Freiburg* [1984] ECR 1177, in Case 269/86 *Mol* v *Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 3627 and in Case 289/86 *Happy Family* v *Inspecteur der Omzetbelasting* [1988] ECR 3655, which related to the illegal importation into the Community of narcotic drugs and their unlawful supply for consideration within the territory of a Member State, the Court held that no liability to turnover tax arose upon the unlawful import of drugs into the Community or on their unlawful supply for consideration within the territory of a Member State, in so far as the products in question were not confined within economic channels strictly controlled by the

competent authorities for use for medical and scientific purposes. On the subject of the importation of counterfeit currency, the Court held, similarly, that its considerations concerning the illegal importation of drugs applied, *a fortiori*, to imports of counterfeit currency (Case C-343/89 *Witzemann* v *Hauptzollamt München-Mitte* [1990] ECR I-4477, paragraph 20).

12 In those judgments, the Court added that illegal imports or supplies of such goods, whose release into the economic and commercial channels of the Community was by definition absolutely precluded and which could give rise only to penalties under the criminal law, were wholly alien to the provisions of the Sixth Directive (see the judgments in Case 294/82, cited above, at paragraphs 19 and 20, in Cases 269/86 and 289/86, cited above, at paragraphs 15 and 17 in each case, and in Case C-343/89, cited above, at paragraph 19). Those judgments therefore concern products which, because of their special characteristics, may not be marketed or incorporated into economic channels.

13 That is not the case for the goods which are at issue in the main proceedings since there is no absolute prohibition on the release to the market of computer systems. Supplies effected for consideration within the Community, imports into the Community and even exports of such goods are, in principle, lawful and may therefore give rise to VAT liability.

14 As may be seen from the order for reference, it is only exports of these goods to certain destinations which are prohibited by the domestic law of all the Member States, because of their possible use for strategic purposes.

15 The question therefore arises whether such a prohibition leads to the exclusion from the scope of the Sixth Directive of exports of these goods.

16 The Sixth Directive, whose purpose is to achieve widespread harmonization in the area of VAT, is based on the principle of fiscal neutrality. That principle, as the Court has stated, precludes a generalized differentiation between lawful and

unlawful transactions, except where, because of the special characteristics of certain products, all competition between a lawful economic sector and an unlawful sector is precluded (see Case 269/86, paragraph 18, and Case 289/86, at paragraph 20).

17 That is not the case where there is no absolute prohibition based on the nature of the goods or their special characteristics, but where only the export of those goods to certain destinations is prohibited, because of their possible use for strategic purposes. Such a prohibition cannot, therefore, be sufficient to remove those products from the scope of the Sixth Directive.

The first question

18 Article 15 of the Sixth Directive provides: '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 territory of the country as defined in Article 3 by or on behalf of the vendor; 2. ...'

19 In accordance with the principle of fiscal neutrality on which the Sixth Directive is based, that provision entails no distinction, as far as exemptions are concerned, between lawful and unlawful exports. When the latter consist of goods which fall within the scope of the Sixth Directive, they must accordingly be treated in the same manner as lawful exports of the same goods.

20 As may be seen from the 11th recital in the preamble to the Sixth Directive, that provision forms part of a common list of exemptions drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member

States. The aim of such exemptions is to ensure that consumers from non-Member States are not subject to VAT, since the intention is that that tax should be borne exclusively by consumers within the Community.

21 It follows that that provision does not authorize the Member States to apply VAT to exports for which it provides exemption. That interpretation is corroborated by Article 17(3) of the directive, according to which the Member States are to grant to every taxable person the right to a deduction or refund of the value added tax in so far as the goods and services are used, *inter alia*, for the purposes of transactions which are exempt under Article 15.

22 Consequently, if the aim of the refusal by a Member State to allow for an export transaction a VAT exemption laid down by the Sixth Directive is to penalize the breach of a national provision requiring authorization for such an export, the refusal serves a purpose alien to that of the Sixth Directive.

23 Accordingly it should be stated in reply to the first question put to the Court that Article 15(1) of the Sixth Directive is to be interpreted as meaning that the exemption of exports provided for therein may not be refused where such exports are made in breach of national provisions requiring prior authorization for exports to States for which, as a result of national provisions imposing an embargo, no authorization could have been issued in any of the Member States of the European Communities.

24 It should be added that this finding is entirely without prejudice to the powers of Member States to impose appropriate penalties, including those with financial consequences, for contraventions of their legislation requiring export permits for certain non-member countries.

The second question

25 In view of the reply to the first question, there is no need to rule on the second question referred to the Court.

Costs

26 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Finanzgericht München, by order of 23 March 1992, hereby rules:

Article 15(1) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment — is to be interpreted as meaning that the exemption for exports provided for therein may not be refused where such exports are made in breach of national provisions requiring prior authorization for exports to States for which, as a result of national provisions imposing an embargo, no authorization could have been issued in any of the Member States of the European Communities.

Kakouris Mancini

Schockweiler Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 2 August 1993.

J.-G. Giraud C. N. Kakouris

Registrar President of the Sixth Chamber