EUROPEAN COMMISSION

ORIGINAL

Brussels, 30 August 2011
sj.d(2011)1009482 RL/mg

TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

WRITTEN OBSERVATIONS

submitted pursuant to Article 23, second paragraph, of the Statute of the Court of Justice by the

EUROPEAN COMMISSION

represented by Richard Lyal, Legal Adviser, and Carine Soulay, a national civil servant on secondment to the Commission's Legal Service, acting as agents, with an address for service in Luxembourg at the office of Antonio Aresu, Legal Adviser, 11 rue A. Weicker, 2721 Luxembourg

in **Case C-225/11**

ABLE UK Ltd

v

THE COMMISSIONERS FOR H.M. REVENUE AND CUSTOMS

Reference to the Court under Article 267 of the Treaty on the Functioning of the European Union from the Upper Tribunal, Finance and Tax Chamber, for a preliminary ruling on the interpretation of the Sixth VAT Directive.

I RELEVANT PROVISIONS OF UNION LAW

1. Pursuant to Article 151(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347/1, referred to below as "the VAT Directive"), the following transactions are exempt from VAT :

> ...
>
> (c) the supply of goods or services within a Member State which is a party to the North Atlantic Treaty, intended either for the armed forces of other States party to that Treaty for the use of those forces, or of the civilian staff accompanying them, or for supplying their messes or canteens when such forces take part in the common defence effort;
>
> ...
>
> Pending the adoption of common tax rules, the exemptions provided for in the first subparagraph shall be subject to the limitations laid down by the host Member State.

II BACKGROUND TO THE CASE

2. The taxpayer in the present case (hereinafter "Able") secured a contract with the United States Department of Transportation Maritime Administration (hereinafter "MARAD") for the dismantling of 13 obsolete ships. The ships were towed from the United States to Able's facilities on Teesside in the United Kingdom and were dismantled there in the presence of US Government inspectors.

3. Able requested a ruling from the tax authorities confirming that the service of dismantling the ships would be exempt from VAT under what is now Article 151(1)(c) of the VAT Directive. The tax authorities considered instead that the supply was subject to tax at the standard rate, since the conditions for exemption under Article 151(1)(c) were not fulfilled.

4. Able appealed to the First-Tier Tribunal, arguing that MARAD was part of the armed forces of another State party to the North Atlantic Treaty, so that services performed for it were exempt from VAT. The tax authorities replied that while that was true, the exemption applied only to NATO forces stationed in the territory of a Member State.

5. The First-Tier Tribunal held that nothing in the wording of Article 151(1)(c) indicated that the exemption was confined to troops stationed in the Member State concerned or visiting that State. On the contrary, had any such limitation been intended, it could have been stated explicitly, as was done in Article 151(1)(e). Able's supplies of dismantling services were therefore exempt. The tax authorities appealed against that decision.

III THE QUESTIONS REFERRED TO THE COURT

6. It was in those circumstances that the Upper Tribunal (Finance and Tax Chamber) decided to refer the following questions to the Court for a preliminary ruling :

> Is Article 151(1)(c) of the Principal VAT Directive to be interpreted as exempting a supply in the UK of services of dismantling obsolete US Navy ships for the US Department of Transportation Maritime Administration in either or both of the following circumstances:
>
> (a) where that supply was not made to a part of the armed forces of a NATO member taking part in the common defence effort or to civilian staff accompanying them;
>
> (b) where that supply was not made to a part of the armed forces of a NATO member stationed in or visiting the UK or to civilian staff accompanying such forces?"

IV OBSERVATIONS

7. It is accepted by the parties to the main proceedings that the supply of services was made in the United Kingdom and that it was made for the use of the armed forces of another State party to the North Atlantic Treaty. The question for the Court is

whether the other conditions for exemption under Article 151(1)(c) are met. And it is necessary in the first place to determine precisely what those conditions are.

8. The Upper Tribunal identifies two possible conditions, namely (i) that the armed forces be taking part in the common defence effort and (ii) that the armed forces be stationed in or visiting the Member State concerned.

9. The first of these conditions is clearly stated in Article 151(1)(c). However, its applicability in the present case has been put in question on the ground that it is not clear whether it relates to all the supplies envisaged by the provision or solely to supplies to the messes or canteens of armed forces. The latter interpretation is based on the absence, in the English version, of a comma between the phrase "supplying their messes or canteens" and the phrase "when such forces take part in the common defence effort".

10. Even taking the English version in isolation, that approach is not convincing. In order to arrive at the conclusion that the condition of participation in the common defence effort relates only to supplies for messes and canteens, it is necessary to have regard not only to the absence of the comma already mentioned but also to the presence of a comma before the phrase "or for supplying their messes or canteens". Only then can it be said that – grammatically – the condition is limited to the latter activity. But the presence of a comma before the phrase "or for supplying their messes or canteens" may equally be understood as the second of two parenthetical commas around the phrase "or of the civilian staff accompanying them" thus robbing the absence of a further comma of its supposed significance.

11. In any event, no such grammatical interpretation can be made on the basis of most of the other language versions of the directive. For the Commission, therefore, a literal interpretation of Article 151(1)(c) makes it clear that the exemption is available only

in respect of supplies made for the use of NATO forces when they are taking part in the common defence effort.

12. Such a literal interpretation is all the more compelling when regard is had to the context and purpose of the provision. These elements also provide assistance in determining whether the second condition identified by the Upper Tribunal obtains, namely that the forces be stationed in or visiting the territory of the Member State concerned.

13. It should be observed at the outset that the function of Article 151 as a whole is to regulate a range of exemptions from VAT that reflect obligations of the Member States under international law which may not prevail over EU law. It was necessary for the VAT legislation to contain express exceptions to the application of VAT in order to allow Member States to respect engagements undertaken on the basis of pre-existing international agreements. It is in this context that point (c) of Article 151(1) is to be understood.

14. A short account of the history of Article 151 may assist in understanding the reasons for the insertion of this provision in the Sixth VAT Directive (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 145/1).

15. The initial VAT legislation of 1967 (First Council Directive 67/227/EEC of 11 April 1967 and Second Council Directive 67/228/EEC of 11 April 1967, OJ 1967 no 71, pp. 1301 and 1304 respectively) contained no provision corresponding to Article 151(1)(c). Member States had sufficient leeway to provide for such exemption under Article 10(3) of the Second Directive, according to which

> Each Member State may, subject to the consultations mentioned in Article 16, determine the other exemptions which it considers necessary.

16. Nor was any such provision included in the proposal for the Sixth Directive (document COM(73)950 of 20 June 1973). That proposal envisaged only the exemptions now contained in Article 151(1)(a) and (b).

17. It was during the discussions of the text in the Council that the exemption in respect of NATO forces was introduced, on the initiative in particular of Belgium. The purpose of the new provision was to enable Member States which were party to the North Atlantic Treaty to meet their obligation under that treaty to provide for exemption for the armed forces of one Contracting Party when in the territory of another Contracting Party in connection with their official duties.

18. It may be assumed that the specific obligation that the Council had in mind was Article VIII of the "Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty" of 28 August 1952, according to which

> 1. For the purpose of facilitating the establishment, construction, maintenance and operation of Allied Headquarters, these Headquarters shall be relieved, so far as practicable, from duties and taxes, affecting expenditures by them in the interest of common defence and for their official and exclusive benefit, and each Party to the present Protocol shall enter into negotiations with any Allied Headquarters operating in its territory for the purpose of concluding an agreement to give effect to this provision.

19. Such a general exemption would not, in the absence of a specific provision, have been compatible with the Sixth Directive, under which the general rule is that all supplies are subject to VAT and taxed. Supplies to NATO forces could not be exempted on the basis of Article 151(1)(b), since NATO forces do not constitute an "international body".

20. It should be noted that Article 151(1)(c) exempts supplies made in a Member State for the use of the armed forces of another NATO country but not supplies made to the armed forces of the host State. The exemption does not cover all supplies made

for the use of NATO armed forces as such. Moreover, the NATO Treaty itself (see point 18 above) does not exempt all supplies to NATO forces but only those made "in the interest of common defence". In so far as it reflects that obligation, the exemption was thus intended to target supplies made to forces of a NATO country when they are "hosted" by a Member State which is also a NATO country.

21. Having regard also to the well established rule that exemptions should be interpreted narrowly, the Commission concludes from the foregoing that Article 151(1)(c) must be interpreted as granting exemption for supplies made for the use of the armed forces of other States party to that Treaty where those forces are present in the territory of the Member State in which the supply is made in order to take part in a common defence effort.

22. Finally, having regard to the remarks of the Upper Tribunal regarding the difference between points (c) and (d) of Article 151(1) and the scope of these two provisions, it should be observed that Article 151(1)(d) was inserted in the VAT legislation by point 15 of Article 1 of Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376/1). In the context of the abolition of frontier controls, this provision covers cross-border supplies where the place of taxation is located in one Member State (which may, indeed, not be a NATO country) and the supply is made to the armed forces of any NATO country other than the Member State of destination of the supplies. This provision thus exempts a supply which is taxable for example in Ireland, made for the use of US forces stationed in the United Kingdom. Such a supply would not be covered by Article 151(1)(c).

V CONCLUSION

The Commission therefore submits that the questions posed by the Upper Tribunal (Finance and Tax Chamber) should be answered as follows:

> Article 151(1)(c) is to be interpreted as exempting the supply in the United Kingdom of services consisting in the dismantling of obsolete ships only if that supply is made to a part of the armed forces of a NATO member stationed in or visiting the UK or to civilian staff accompanying such forces, in the context of the common defence effort.