

## JUDGMENT OF THE COURT (Second Chamber)

3 July 2014 (\*)

(Taxation — Directive 92/12/EEC — Articles 7, 8 and 9 — General arrangements for products subject to excise duty — Products released for consumption in one Member State and held for commercial purposes in another Member State — Whether excise duty is chargeable to a person holding those products who has acquired them in the Member State of destination — Acquisition at the end of the entry process)

In Case C-165/13,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Bundesfinanzhof (Germany), made by decision of 12 December 2012, received at the Court on 3 April 2013, in the proceedings

**Stanislav Gross**

v

**Hauptzollamt Braunschweig,**

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arebris (Rapporteur), J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the European Commission, by W. Mölls and C. Barslev, 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 Articles 7 and 9 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), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124) ('Directive 92/12').
- 2 The request has been made in proceedings between Mr Gross and the Hauptzollamt Braunschweig (Principal Customs Office of Braunschweig) concerning the Hauptzollamt Braunschweig's decision requiring Mr Gross to pay excise duty on tobacco products.

## Legal context

### Directive 92/12

- 3 The fifth and sixth recitals in the preamble to Directive 92/12 are worded as follows:

'... any delivery, holding with a view to delivery or supply for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, taking place in a Member State other than that in which the product is released for consumption gives rise to chargeability of the excise duty in that other Member State;

... [I]n the case of products subject to excise duty acquired by private individuals for their own use and transported by them, the duty must be charged in the country where they were acquired.'

- 4 Article 6 of that directive provides:

'1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14 (3).

Release for consumption of products subject to excise duty shall mean:

- (a) any departure, including irregular departure, from a suspension arrangement;
- (b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;
- (c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.'

- 5 Under Article 7(1) to (3) of that directive:

'1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered, intended for delivery in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.

3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.'

- 6 Article 8 of Directive 92/12 provides:

'As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the

Member State in which they are acquired.'

7 Under Article 9(1) and (2) of that directive:

'1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State.

In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products.

2. To establish that the products referred to in Article 8 are intended for commercial purposes, Member States must take account, inter alia, of the following:

- the commercial status of the holder of the products and his reasons for holding them,
  - the place where the products are located or, if appropriate, the mode of transport used,
  - any document relating to the products,
  - the nature of the products,
  - the quantity of the products.
- ...'

*German legislation*

8 Paragraph 12(1) of the Law on Tobacco Duty (Tabaksteuergesetz) of 31 August 1994, in the version applicable in the main proceedings ('the TabStG'), provides:

'Duty in respect of tobacco products shall be paid by means of the use of tax markings. The use of tax markings shall include cancelling the tax markings and affixing them to the individual sales packages. Tax markings must be used when duty becomes chargeable.'

9 Paragraph 19 of the TabStG provides:

'Where tobacco products released into free circulation in other Member States are, for commercial purposes, brought into or dispatched to the fiscal territory in an unlawful manner contrary to Paragraph 12(1), duty shall become chargeable at the time of entry into or dispatch to the fiscal territory. Liability for duty shall fall both on the person bringing the tobacco products into, or dispatching them to, the fiscal territory and on the recipient of those products as soon as he takes possession of them. ...'

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

10 Mr Gross was sentenced by final judgment to imprisonment on four counts of taking receipt, on a commercial basis, of goods on which duty had not been paid. The criminal court found that Mr Gross had repeatedly taken, from an organisation involved in cigarette smuggling, cigarettes which had not been cleared through customs and on which excise duty on tobacco products had not been paid, in order to resell them.

11 By notice of 28 July 2010, the Hauptzollamt Braunschweig sought to recover from Mr Gross, jointly and severally with three other debtors, the sum of EUR 15 136 (not including interest) by way of excise duty on tobacco.

12 Mr Gross brought an action before the Finanzgericht (Finance Court) which ruled that the

excise duty was chargeable pursuant to the first sentence of Paragraph 19 of the TabStG. The Finanzgericht found that, in the dispute before it, cigarettes bearing no German tax markings had been brought from another Member State into German fiscal territory for commercial purposes outside a suspension arrangement. The Finanzgericht reproduced the factual findings made in the judgment of the criminal court. After the cigarettes had entered German fiscal territory, Mr Gross took possession of them as recipient, thereby becoming liable to excise duty in accordance with the second sentence of Paragraph 19 of the TabStG.

- 13 Mr Gross brought an appeal on a point of law before the Bundesfinanzhof (Federal Finance Court; or ‘the referring court’) against the judgment of the Finanzgericht.
- 14 The referring court harbours doubts as to whether Article 9(1) of Directive 92/12 is to be interpreted as meaning that excise duty is owed by any person who, for commercial purposes, holds in one Member State products subject to excise duty which have been released for consumption in another Member State, or whether that provision must be narrowly construed, to the effect that excise duty is owed only by the person who first holds the products for commercial purposes in the former Member State.
- 15 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the second subparagraph of Article 9(1) of Directive 92/12 ... notwithstanding its schematic connection with Article 7(3) of that directive, preclude legislation of a Member State under which a person who, for commercial purposes, holds products subject to excise duty which have been released for consumption in another Member State is not liable for duty in circumstances where he did not acquire those products from another person until after the entry process had been completed?’

### **Consideration of the question referred for a preliminary ruling**

- 16 By its question, the referring court asks, in essence, whether Article 9(1) of Directive 92/12 must be interpreted as allowing a Member State to designate as liable to excise duty a person who holds for commercial purposes, on the fiscal territory of that Member State, products subject to excise duty that have been released for consumption in another Member State, even though that person was not the first holder of those products in the Member State of destination.
- 17 At the outset, it should be noted that the aim of Directive 92/12 is to lay down a number of rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties is identical in all the Member States. That harmonisation makes it possible, in principle, to avoid double taxation in relations between Member States (*Scandic Distilleries*, C-663/11, EU:C:2013:347, paragraphs 22 and 23).
- 18 In that regard, in the event of products subject to excise duty being released for consumption in one Member State, Directive 92/12 establishes — as can be seen, *inter alia*, from its fifth and sixth recitals — a distinction between, on the one hand, products held in another Member State for commercial purposes by a trader carrying out an economic activity independently and, on the other, products acquired by private individuals for their own use and transported by them into another Member State.
- 19 It emerges from the order for reference that Mr Gross obtained, from an organisation involved in smuggling cigarettes released for consumption in a Member State other than the Federal Republic of Germany, cigarettes on which excise duty had not been paid, in order to resell them in Germany. It is therefore common ground that the cigarettes at issue in the main proceedings were brought into German territory for commercial purposes even though they lacked the requisite national tax markings.
- 20 It should be borne in mind that, in the procedure laid down in Article 267 TFEU for cooperation

between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, even if, formally, the question referred for a preliminary ruling relates directly to the interpretation of Article 9 of Directive 92/12, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating the case pending before it, whether or not the national court has referred to them in the wording of its questions. It is, in that regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in relation to the subject-matter of the dispute (see *Worten*, C-342/12, EU:C:2013:355, paragraphs 30 and 31).

- 21 It is not in dispute that Mr Gross had repeatedly obtained the products at issue from other persons after those products had been unlawfully brought into German fiscal territory (see, to that effect, *Salumets and Others*, C-455/98, EU:C:2000:352, paragraph 19), in order to resell them and thereby derive income.
- 22 Accordingly, Article 7 of Directive 92/12 is capable of applying to the case before the referring court since, under paragraph 2 thereof, Article 7 covers the situation in which products are delivered, or intended for delivery, in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently.
- 23 It is appropriate, therefore, to interpret Article 9 of Directive 92/12 in conjunction with Article 7 of that directive.
- 24 Under paragraphs 1 and 3 of Article 7, read in conjunction, excise duty is due in the Member State in which the products are held, *inter alia*, from the person receiving the products at issue or from the relevant trader.
- 25 In particular, in expressly providing that the person ‘receiving the products’ at issue may be liable to excise duty on products subject to that duty released for consumption in a Member State and held for commercial purposes in another Member State, Article 7(3) of Directive 92/12 must be interpreted as meaning that any holder of the products at issue is liable to excise duty.
- 26 A more restrictive interpretation, to the effect that only the first holder of the products at issue is liable to excise duty, would defeat the purpose of Directive 92/12. Under that directive, the movement of products from the territory of one Member State to that of another may not give rise to systematic checks by national authorities, which are liable to impede the free movement of goods in the internal market of the European Union. Consequently, such an interpretation would render more uncertain the collection of excise duty due upon the crossing of an EU border.
- 27 That conclusion is also supported by Article 33(3) of Council Directive 2008/118 of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12 (OJ 2009 L 9, p.12), which simplifies the provision made under Article 7 of Directive 92/12 by referring solely to the person ‘to whom the goods are delivered in the other Member State’ (*Metro Cash & Carry Danmark*, C-315/12, EU:C:2013:503, paragraph 36).
- 28 It follows from the foregoing that Article 9(1) of Directive 92/12, read in conjunction with Article 7 of that directive, must be interpreted as allowing a Member State to designate as liable to excise duty a person who holds for commercial purposes, on the fiscal territory of that State, products subject to excise duty that have been released for consumption in another Member State, in circumstances such as those of the case before the referring court, even though that person was not the first holder of those products in the Member State of destination.

## 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 (Second Chamber) hereby rules:

**Article 9(1) 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, as amended by Council Directive 92/108/EEC of 14 December 1992, read in conjunction with Article 7 of that directive, must be interpreted as allowing a Member State to designate as liable to excise duty a person who holds for commercial purposes, on the fiscal territory of that State, products subject to excise duty that have been released for consumption in another Member State, in circumstances such as those of the case before the referring court, even though that person was not the first holder of those products in the Member State of destination.**

[Signatures]

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\* Language of the case: German.