JUDGMENT OF THE COURT (Sixth Chamber)

25 January 2001 *

In Case C-429/97,

Commission of the European Communities, represented by H. Michard and E. Traversa, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented initially by K. Rispal-Bellanger and G. Mignot, then by K. Rispal-Bellanger and S. Seam, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by refusing to refund value added tax to taxable persons not established in France, in cases where those taxable persons had subcontracted part of their work to a taxable person established in France, the French Republic has failed to fulfil its obligations under the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of

* Language of the case: French.

the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11), in particular Article 2 thereof,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris (Rapporteur) and J.-P. Puissochet, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 December 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by refusing to refund value added tax (hereinafter 'VAT') to taxable persons not established in France, in cases where those taxable persons had subcontracted part of their work to a taxable person established in France, the French Republic has failed to fulfil its obligations under the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11, hereinafter 'the Eighth Directive'), in particular Article 2 thereof.

The legal background

The Community legislation

The Eighth Directive

2 According to the second recital in the preamble thereto, the Eighth Directive is intended to ensure that a taxable person established in the territory of one Member State can claim for tax which has been invoiced to him in respect of

supplies of goods or services in another Member State, thereby avoiding double taxation.

3 Article 1 of the Eighth Directive states:

'[f]or the purposes of this Directive, "a taxable person not established in the territory of the country" shall mean a person as referred to in Article 4(1) of Directive 77/388/EEC who, during the period referred to in the first and second sentences of the first subparagraph of Article 7(1), has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected, nor, if no such seat or fixed establishment exists, his domicile or normal place of residence, and who, during the same period, has supplied no goods or services deemed to have been supplied in that country...'.

4 Article 2 of the Eighth Directive provides:

'[e]ach Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC and of the provision of services referred to in Article 1(b).'

The Sixth Directive

5 Article 9(1) of the 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, hereinafter 'the Sixth Directive') provides:

'[t]he place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

6 Article 9(2) of the Sixth Directive is worded as follows:

'...

(c) the place of the supply of services relating to:

— ...

— ...

— ...

— work on movable tangible property,

shall be the place where those services are physically carried out'.

The national legislation

7 In France, the fourth indent of Article 9(2)(c) of the Sixth Directive is transposed by Article 259 A 4° of the Code Général des Impôts (General Tax Code). In the wording thereof which is applicable to this case, that provision states:

'[b]y derogation from the provisions of Article 259, the place of supply of the following services shall be deemed to be in France:

...

4. The following services where they are physically carried out in France:

...

work on and valuations of movable tangible property'.

8 The file shows that a circular from the French tax legislation service, concerning the rules applicable to waste disposal operations in France and to transport services on importation supplied in connection therewith, was sent to all French departments responsible for applying VAT. That circular states, in particular, that 'disposal operations are covered by Article 259 A 4° of the Code Général des Impôts which transposes into French law Article 9(2)(c) of the Sixth Directive [... and] are subject to VAT in France in cases where they are physically carried out there. Those provisions apply to an operation carried out by a site operator who does the work himself. They also apply to the service which the undertaking holding the disposal contract supplies to its customers, provided that that undertaking invoices them with the total amount for the operation, the main element of which is the price which it is charged by the site operator. The fact that that undertaking does not carry out the physical disposal operations itself but entrusts them to another undertaking does not affect those provisions...'.

The facts and the pre-litigation procedure

9 The file shows that the French authorities refuse to confer the benefit of the provisions of the Eighth Directive on undertakings entrusted with the collection, sorting, transport and disposal of waste which are established in another Member State and use French subcontractors to dispose of part of that waste.

10 Those undertakings holding the main contract for the collection and disposal of waste invoiced their service customers, pursuant to Article 9(1) of the Sixth Directive, with the VAT of the Member State of their establishment in respect of the total amount of the price. They also paid the French VAT which they were invoiced by their subcontractors established in France.

11 When the main contractors subsequently claimed refunds of the VAT thus paid, they met with refusals on the part of the French authorities on the ground that, under Article 259 A 4° of the Code Général des Impôts, as interpreted by those authorities, the main contractors themselves are deemed to have carried out in France the whole of their supply of services relating to the waste, since the physical disposal of that waste, which constitutes the main and decisive element of that supply and its price, is carried out in France; consequently, in the view of those authorities, the Eighth Directive cannot possibly apply.

12 The undertakings in question were then invited to have a tax representative accredited to the French tax authorities, to be responsible for paying the VAT due in respect of operations deemed to have been carried out in France.

13 By letters of 23 September and 22 December 1992, the Commission asked the French authorities for a detailed explanation of their reasons for regarding the provisions of the Eighth Directive as inapplicable in this case. It pointed out that the matter goes far beyond the field of waste disposal since it concerns the more general issue of which VAT rules are applicable to composite operations involving operators established in several Member States.

14 At a meeting on 17 November 1992 between Commission staff and the French authorites, and by letter of 5 January 1993, the latter made known their views on the matter.

15 Taking the view that the refusal to refund French VAT constitutes a breach of the Eighth Directive, the Commission initiated the procedure provided for in

Article 169 of the Treaty and, by letter of 8 June 1993, gave the French Government formal notice to submit its observations to it within two months from the receipt of that letter.

16 In that letter, the Commission pointed out, in particular, that, in the case of a contract covering the supply of different types of service, such as the collection, sorting and disposal of waste, it was necessary to apply the general rule laid down in Article 9(1) of the Sixth Directive, which provides for taxation in the Member State of establishment of the taxable person; that rule makes it possible to ensure the uniform taxation of the whole of the service rendered by the service provider to its customer. However, in so far as one of those services, namely, waste disposal, is regarded as 'work on movable tangible property' within the meaning of Article 9(2)(c) of the Sixth Directive, and that service is performed by a subcontractor separate from the main contractor, it should be subject to VAT in the Member State where it is physically carried out, namely, in this case, France. Although the collection of French VAT is therefore justified, the foreign undertaking which bore it should be able to obtain a refund of that VAT in France, in accordance with the Eighth Directive.

17 By letter of 6 August 1993 the French authorities replied to the letter of formal notice, confirming their view and explaining that the various operations effected by the foreign undertaking constitute a single waste disposal operation which is carried out only at the end of the treatment process, that the self-contained nature of the contract concluded between the foreign undertaking and its French subcontractor does not alter the nature of the service provided and that no 'residual' tax arises, inasmuch as the foreign company can recover its input tax by way of deduction.

18 On 10 April 1996 the Commission sent the French Republic a reasoned opinion confirming its position that it was unable to share that Member State's

interpretation of the fourth indent of Article 9(2)(c) of the Sixth Directive and requesting it to take the measures necessary to comply with that opinion within two months from its notification.

19 The French authorities did not comply with the reasoned opinion, but, by letter of 12 June 1996, replied to the Commission, justifying their position.

20 That being the situation, the Commission brought the present action.

Admissibility

21 The French Government raises an objection of partial inadmissibility of the action in so far as it goes beyond the case of services relating to waste disposal.

22 First, in so far as it concerns the supply of services other than those relating to waste disposal, the action is inadmissible in that it is not founded on any specific complaint against the French Republic. Nowhere in the application are matters of law or of fact set out in support of the Commission's claim that there has been a general failure by that Member State to fulfil its obligations under the Eighth

Directive in cases other than that of the supply of services supplied relating to waste disposal.

23 Second, that part of the action is also inadmissible in so far as, by not indicating at any stage during the pre-litigation procedure which provision of national law or which administrative practice it was calling in question in order to claim the existence of a general breach of obligations, the Commission failed to have regard to the purpose of that pre-litigation procedure, which, as the Court has consistently held, is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other hand, to make proper arrangements for its defence against the complaints made by the Commission.

24 The Commission contends that the action is admissible, submitting, first, that the French authorities' interpretation, as implemented in connection with waste disposal operations, concerns the general and fundamental question regarding the application of the provisions of Article 9 of the Sixth Directive to composite operations, where a subcontractor established in a different Member State from the main contractor carries out, on behalf of the latter, part of the operation in France. Second, there has been no infringement of the right of the French Government to a fair hearing since the grounds for complaint were not expanded or altered in the course of the procedure.

25 In order to rule on the objection raised by the French Government, including the part thereof relating to non-observance of the right to a fair hearing, it must first be determined whether, in so far as it goes beyond the case of services relating to waste disposal, the Commission's action is founded on specific matters of law and of fact. That question is covered by the examination of the substance of the action brought by the Commission.

26 The objection of inadmissibility raised by the French Government must therefore be examined together with the substance of the action.

Substance

27 The Commission alleges failure by the French Republic to fulfil its obligations under the Eighth Directive, in particular Article 2 thereof, inasmuch as it refuses to refund to taxable persons not established in France the VAT paid by them in France in cases where they have subcontracted part of their work to a taxable person established in France.

28 The effect of Articles 1 and 2 of the Eighth Directive is that a taxable person is entitled to a refund of VAT paid in another Member State if he does not have a business or fixed establishment in that State and if he has supplied no goods or services there.

29 In order to determine more specifically whether a service has been supplied in a Member State, reference must be made to Article 9 of the Sixth Directive.

30 Under Article 9(1), the place where a service is supplied is deemed to be the place where the supplier has established his business or has a fixed establishment.

31 Paragraph 2 of that article sets out a series of specific instances of places where certain categories of service are deemed to be supplied. Thus, that provision states, in the fourth indent of subparagraph (c), that the place of supply of services relating to work on movable tangible property is the place where those services are physically carried out.

32 In this case, the parties disagree as to the place with which a composite supply of services comprising various operations relating to waste — such as the collection, sorting, transport, storage, treatment, recycling and actual disposal, etc. — is to be connected where the main contractor for that supply is established in a Member State, other than the French Republic, in which, amongst other things, some of those operations are carried out, whereas the actual disposal of the waste takes place partly in France where it is carried out by a subcontractor. It is not disputed that the services supplied by the latter must be subject to French VAT. The question which arises is to determine the place of the composite supply viewed as a whole.

33 According to the Commission, since Article 9(2) of the Sixth Directive does not contain any specific rule of connection for such a composite supply of services, the place where such services are supplied must be that laid down in paragraph 1 of that provision, that is to say, the place where the contractor has established his business.

34 The Commission maintains in this regard that such a composite supply involves a set of different operations in succession, only some of which consist of 'work on movable tangible property' within the meaning of the fourth indent of Article 9(2)(c) of the Sixth Directive, and all of which alike form part of the waste disposal process. When the waste disposal contractor agrees to dispose of his customers' waste, the contract in question applies to all those operations. The

fact that the main contractor then uses the services of a subcontractor in another Member State in order to carry out one part of the process, consisting of the final disposal of the waste remaining after the various upstream operations — such as the collection, sorting, treatment and recycling — have been carried out, cannot alter the rules governing the place where services, as defined in Article 9 of the Sixth Directive, are to be deemed to be supplied.

35 In particular, it argues, it is not possible to single out, as the French Republic does, one of the operations in the process, which took place in a Member State other than that of the main contractor, on the ground that that operation, the actual disposal of the waste, is decisive from the point of view of the customer or even for achieving the objective of the composite supply.

36 By contrast, the French Government contends that the service supplied by the contractor to its customer is invoiced to the latter on an aggregate and inclusive basis and, in actual fact, forms a whole which constitutes a single and aggregate supply of 'a service of waste management'. It refers in particular to the definition of 'waste management' in Article 1(d) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32), according to which management means 'the collection, transport, recovery and disposal of waste, including the supervision of such operations and after-care of disposal sites'.

37 It further contends that, in accordance with the case-law (see the '*Advertising services*' cases, in particular Case C-68/92 *Commission* v *France* [1993] ECR I-5881, paragraphs 18 and 19), the characterisation of such a supply of services

must be determined in the light of the purpose pursued by it, namely, in this case, the disposal or recovery of the waste produced by the customer, which constitutes work on movable tangible property. Consequently, the activity in question should be characterised as 'the supply of services relating to... work on movable tangible property' within the meaning of the fourth indent of Article 9(2)(c) of the Sixth Directive and should therefore be taxed at the place where the disposal was physically carried out.

38 The conclusion with regard to characterisation of the service supplied would not be different if, as the Commission suggests, the various operations which take place as part of that supply were taken into consideration. All those operations constitute work on movable tangible property.

39 Consequently, even if the French Republic does not systematically tax the whole of the supply for which the main contractor is responsible, the service which the latter renders to his customer must be deemed to have been performed in France if the actual disposal of the waste is carried out there, which precludes the application of, at the very least, one of the conditions laid down in Article 1 of the Eighth Directive and, by that very fact, the refund of VAT paid in France. The fact that the main contractor entrusts the physical performance of the contract to a subcontractor cannot change anything as regards the determination of the place of the supply of services effected by the main contractor.

40 It should be pointed out, first, that where, as in this case, it is necessary to characterise, for the purposes of VAT, a composite supply taken as a whole, the connection of that supply with Article 9(1) or with the fourth indent of

Article 9(2)(c) of the Sixth Directive must be such as to ensure its rational and uniform taxation.

41 Second, it must be borne in mind that, as regards the relationship between Article 9(1) and Article 9(2) of the Sixth Directive, the Court has already held that Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) lays down the general rule on the matter. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, second, non-taxation, as Article 9(3) indicates, albeit only as regards specific situations. In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1) (see Case C-327/94 *Dudda* v *Finanzamt Bergisch Gladbach* [1996] ECR I-4595, paragraphs 20 and 21).

42 It must therefore be ascertained whether the composite supply at issue in this case is, as the French Government contends, specifically governed by the fourth indent of Article 9(2)(c) of the Sixth Directive, concerning the supply of services relating to work on movable tangible property. To that end, it is appropriate to take account of all the elements which characterise that supply.

43 Thus, the file shows that it is carried out by undertakings which agree, under contracts entered into with local authorities, industrial undertakings and public or private bodies, to collect, sort, transport and dispose of waste and household refuse. In particular, under those contracts, the undertakings providing the services are required to draw up a collection plan, select the collection points, organise the transport of the waste, store it, organise the sorting operations,

choose the methods of disposing of the sorted waste, transport the various types of waste to the various disposal sites, destroy part of it, recover some of that waste and, where appropriate, use the services of other undertakings, specialising, *inter alia*, in the disposal of certain types of waste.

44 The file also shows that the undertakings holding those contracts are established in a Member State other than the French Republic. The same is true of their customers. In addition, with the exception of the disposal of certain types of waste, which is entrusted to specialist subcontractors established in France, all the abovementioned operations comprising the composite supply are carried out in the other Member State. It is in that same State that the main contractors organise the resources at their disposal and employ their know-how in order to ensure the proper performance of their contracts.

45 Furthermore, the main contractors invoice their customers with the price corresponding to the whole of their composite supply, including in respect of the part which they have subcontracted to a French undertaking. That price includes the VAT which they have had to pay in respect of the whole of their supply.

46 In the light of those factors, to regard such a composite supply as covered by the fourth indent of Article 9(2)(c) of the Sixth Directive would amount to making it subject, for the purposes of VAT, to the legislation of the Member State in which it is physically carried out. However, in view of the composite nature of that supply, the effect of applying such a connecting factor would be to create uncertainty as to the rate of VAT at which the main contractor must invoice his

customers whenever any of the operations comprising the composite supply takes place in a Member State other than that in which the main contractor is established.

47 For the same reason, the application of that connecting factor would be liable to create conflicts of jurisdiction between Member States, which would run counter to the objectives of Article 9 of the Sixth Directive, including, therefore, that of the fourth indent of Article 9(2)(c).

48 It follows that such a supply cannot be governed by the fourth indent of Article 9(2)(c) of the Sixth Directive, regardless of whether the actual disposal of the waste constitutes work on movable tangible property within the meaning of that provision.

49 On the other hand, the general rule set forth in Article 9(1) of the Sixth Directive lays down a definite, simple and practical criterion for the connection of that type of supply, which is that of the place where the supplier has established his business or has a fixed establishment from which the service is supplied. In view of the factors mentioned in paragraphs 43 to 45 of this judgment, that provision is such as to ensure the rational and uniform taxation of the composite supply taken as a whole and to avoid conflicts of jurisdiction between Member States.

50 The composite supply in question therefore falls within the scope of Article 9(1) of the Sixth Directive.

51 The French Government objects that such an interpretation may result in non-taxation in certain cases. Thus, where the main contractor is established outside the Community, the service arising from the main contract could not be subject to any taxation within the Community, even though the supply is physically performed there by a subcontractor and the service is actually enjoyed there, that is to say, the waste is actually disposed of or recovered within the Community.

52 The argument put forward by the French Government cannot call in question the finding made in paragraph 50 of this judgment. The hypothetical situation contemplated by that government concerns a possibility which arises from the limits of the geographical scope of the Community rules on VAT and for that reason cannot affect the interpretation of Article 9 of the Sixth Directive.

53 It follows from the foregoing that, where the holder of the main contract for a composite supply of services relating to waste disposal has its business or a fixed establishment in a Member State other than the French Republic, the services which it performs are deemed to be supplied in the first State, even if it entrusts the actual disposal of the waste to a subcontractor, who is a taxable person for the purposes of VAT in France, whilst paying the corresponding VAT. Since the

conditions to which the refund of VAT is subject under the Eighth Directive are thus fulfilled, the main contractor is justified in subsequently claiming, on the basis of Article 2 of the Eighth Directive, the refund of the VAT paid in France.

54 It must therefore be held that, by refusing to refund to taxable persons established in a Member State other than the French Republic, who are holders of a main contract for a composite supply of services relating to waste disposal, the VAT which they have been required to pay to the French State in cases where they have subcontracted part of the work covered by such a contract to a taxable person established in France, the French Republic has failed to fulfil its obligations under the Eighth Directive, in particular Article 2 thereof.

55 Finally, it remains to consider the objection raised by the French Government to the action, claiming that it goes beyond the case of services relating to waste disposal.

56 The file shows that the Commission set out in general terms the conclusions of the reasoned opinion which it sent to the French authorities and that it reproduced that wording in the form of order sought in its application. However, it must be pointed out that, both during the pre-litigation procedure and in the action brought before the Court, the whole of the argument put forward by the Commission covered only the supply of services relating to waste disposal and that it did not refer to any matters of fact or of law intended to show that the French authorities had failed to fulfil their obligations arising from the Eighth Directive in respect of cases other than that relating to waste disposal.

57 Consequently, the remainder of the application must be dismissed.

Costs

58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been largely unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by refusing to refund to taxable persons established in a Member State other than the French Republic, who are holders of a main contract for a composite supply of services relating to waste disposal, the value added tax which they have been required to pay to the French State in cases where they have subcontracted part of the work covered by such a contract to a taxable person established in France, the French Republic has failed to fulfil its obligations under the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country, in particular Article 2 thereof;**

2. **Dismisses the remainder of the application;**

3. **Orders the French Republic to pay the costs.**

Gulmann Skouris Puissochet

Delivered in open court in Luxembourg on 25 January 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber