JUDGMENT OF THE COURT (First Chamber)

27 May 2004 *

In Case C-68/03,

REFERENCE to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Staatssecretaris van Financiën

and

D. Lipjes,

on the interpretation of Article 28b 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 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December

* Language of the case: Dutch.

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, p. 1),

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Rosas, A. La Pergola, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Portuguese Government, by L.I. Fernandes and Â. Seiça Neves, acting as Agents,

— the Commission of the European Communities, by E. Traversa and D.W. V. Zijlstra, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2004,

gives the following

Judgment

1 By judgment of 14 February 2003, received at the Court on 17 February 2003, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 28b 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 1977 L 145, p. 1), in the version resulting from Council 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, p. 1) (hereinafter 'the Sixth Directive').

2 The questions have been raised in proceedings between the Staatssecretaris van Financiën and Mr Lipjes concerning the charging of value added tax ('VAT') on supplies of intermediary services effected by Mr Lipjes in France.

Main proceedings, legal framework and questions referred for a preliminary ruling

3 Mr Lipjes, who resides in the Netherlands, is a trader involved in the purchase and sale of used leisure watercraft and as a broker in the sale and purchase of yachts. In 1996 and 1997, he was twice involved in the purchase of yachts located in France, in both cases apparently on behalf of an individual purchaser residing in the Netherlands, whereas the vendor was an individual residing in France. Mr Lipjes did not declare the VAT pertaining to those two intermediary operations in either the Netherlands or France.

4 Following an audit, the Netherlands tax authorities charged VAT retroactively on those supplies of services. The Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) (Netherlands), before which the case was brought, found that, in the light of the place where the yachts were situated at the time of the sale, the intermediary services had not been supplied in the Netherlands and that Mr Lipjes was therefore entitled not to declare the VAT there.

5 That court relied on Article 6a(3)(c) of the Wet op de omzetbelasting 1968 (1968 Law on turnover tax) of 28 June 1968 (*Staatsblad* 1968, 329), as amended by the Law of 24 December 1992 (*Staatsblad* 1992, 713). That provision corresponds to the

first paragraph of Article 28b(E)(3) of the Sixth Directive, which provides with respect to intra-Community transactions:

'By way of derogation from Article 9(1), the place of the supply of services rendered by intermediaries acting in the name and for the account of other persons, when such services form part of transactions other than those referred to in paragraph 1 or 2 or in Article 9(2)(e), shall be the place where those transactions are carried out.

However, where the customer is identified for purposes of value added tax in a Member State other than that within the territory of which those transactions are carried out, the place of supply of the services rendered by the intermediary shall be deemed to be within the territory of the Member State which issued the customer with the value added tax identification number under which the service was rendered to him by the intermediary.'

6 Article 9(1) of the Sixth Directive, from which that provision makes an exception, establishes the place where a service is supplied as in principle the place where the supplier has established his business.

7 The Gerechtshof found that, since the yachts were in France and since the intermediary services had been supplied there as well, it was appropriate to apply not the general provision but the exception applying to intra-Community transactions, with the result that the Kingdom of the Netherlands is not entitled to make the transactions subject to VAT.

8 The Staatssecretaris van Financiën appealed against that judgment to the Hoge Raad der Nederlanden. It argues that Article 28b(E)(3) of the Sixth Directive and the corresponding national provision must be interpreted narrowly to the effect that the term 'transactions' includes intermediary services only when the underlying contract, that is, the contract for the supply of a product or service, was concluded by professionals subject to VAT, which is not the case in the main proceedings, which involves individuals.

9 The Hoge Raad der Nederlanden, taking the view that the case raised questions to which the case-law of the Court currently does not offer sufficient answers, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must Article 28b(E)(3) of the Sixth Directive be construed as meaning that that provision refers only to services by intermediaries where the recipient of the service is a taxable person within the meaning of the directive or a non-taxable legal person within the meaning of Article 28a of the Directive?

2. If not, must the first sentence of Article 28b(E)(3) of the Sixth Directive then be construed as meaning that where an intermediary acts in the purchase and sale of a tangible object between two individuals, for the purposes of determining the place where the intermediary acts, regard must be had to the place where the transaction is carried out, as if the transaction were a supply or service by a taxable person as referred to in Article 8 of the Sixth Directive?'

The questions referred for a preliminary ruling

First question

10 According to the Netherlands Government, partly supported by the Portuguese Government, Article 28b(E)(3) of the Sixth Directive must be interpreted narrowly, excluding the services of intermediaries when the underlying contract was concluded between individuals and was thus not a taxable transaction. That provision provides that the place where the intermediary supplied the service must, in principle, be linked to the place of the principal supply, which would make sense only if the principal supply comes within the scope of application of the Sixth Directive, that is, if it was effected by a taxable person. Since that was not so in the present case, the general rule in Article 9(1) of the Sixth Directive, the import of which is to take as a reference Mr Lipjes' place of business, which was in the Netherlands, applies.

11 All of Title XVIa of the Sixth Directive, under which Article 28b falls, covers intra-Community supplies and acquisitions as well as movement, which are all transactions performed by taxable persons or non-taxable legal persons. Thus Article 28a of the directive refers systematically to supplies by taxable persons or non-taxable legal persons. As a matter of coherence then, Article 28b should be interpreted in the same manner.

12 This approach is supported by the second subparagraph of Article 28b(E)(3), which refers to customers who are identified for VAT purposes by means of an identification number. This could also be true only for taxable persons or non-taxable legal persons.

13 Furthermore, the purpose of the provision in question is to avoid customer companies from exercising their right to a deduction in a Member State other than the one where they are subject to VAT. A rule such as this is not necessary for individuals who receive services and who are not entitled to a deduction. The approach adopted also best reflects economic realities and sound tax policy.

14 According to the Commission, it is not appropriate to restrict the scope of application of Article 28b(E)(3) of the Sixth Directive by departing from its very clear wording, which provides expressly for an exception to the general provisions for the category of intermediary transactions, without distinguishing according to the parties to the contract forming the basis of the transaction. There is no reason to depart from that rule when the underlying contract is a non-taxable transaction. The system of intra-Community trade as a whole, as referred to in Title XVIa of the Sixth Directive, is not confined to trade between professionals.

15 The term 'transactions' is used in several places in the Sixth Directive to refer to both services between taxable persons and those supplied to individuals, such as in Article 4(3) and (5). A restrictive interpretation of Article 28b(E)(3) of the directive would lead to complex distinctions and would run counter to the principles of simplicity in the treatment of transactions and rational, homogenous taxation.

16 The Court notes, as a preliminary point, that as regards the relationship between Article 9(1) and Article 28b(E) of the Sixth Directive, Article 28b(E) provides, with respect to intra-Community trade, for an exception to the general rule in Article 9 (1). Article 9(1) in no way takes precedence, therefore, and the question must be asked in each case which of those two provisions applies (see, regarding the similar relationship between Article 9(1) and Article 9(2) of the Sixth Directive, Case C-327/94 *Dudda* [1996] ECR I-4595, paragraphs 20 and 21).

17 Since the present case concerns intra-Community trade, Article 28b(E)(3) of the Sixth Directive is, in principle, applicable. It is therefore necessary to consider whether that applicability may be affected by the fact that the object of the intermediary service was a non-taxable transaction.

18 On this point, the Court notes that it follows from the wording of the first paragraph of Article 28b(E)(3) of the Sixth Directive that it covers generally supplies of services rendered by intermediaries 'acting in the name and for the account of other persons', without distinguishing according to whether or not the recipients of the services are subject to VAT.

19 Likewise, none of the provisions of Title XVIa of the Sixth Directive, under which Article 28b falls, indicates that they do not cover any supplies to individuals not subject to VAT. In addition, as pointed out by the Commission, the term 'trade between Member States' used in the wording of that title covers supplies to both taxable and non-taxable persons. The fact that various provisions of that title, like

Article 28a, refer to the taxable nature of some transactions has no bearing on the scope of Article 28b, the sole object of which is to determine the place of those transactions.

20 As regards the argument of the Netherlands Government that the second subparagraph of Article 28b(E)(3), which refers to customers identified for VAT purposes by an identification number in a Member State other than that within the territory of which those transactions were carried out, suffice it to note that that paragraph, which begins with the word 'however', refers to a very specific category of exceptions which has no bearing on the general rule laid down in the preceding paragraph.

21 As stated by the Advocate General in paragraphs 36 to 40 of his Opinion, for the purposes of determining the place of an intermediary's activities, it does not matter whether the principal transaction is subject to VAT or whether the transaction is non-taxable.

22 Lastly, as regards the Netherlands Government's argument that Article 28b(E)(3) of the Sixth Directive concerns primarily entitlement to VAT deduction which is of no interest to an individual, suffice it to note that nothing in the wording of that provision supports that proposition, since the provision refers only to the determination of the place of the intermediary's service and in no way to an entitlement to deduction for individuals who are recipients.

23 Accordingly, it is appropriate to answer the first question as follows: Article 28b(E)(3) of the Sixth Directive is not to be interpreted as meaning that it covers only the services of intermediaries provided to a taxable person or to a non-taxable legal person for the purposes of VAT.

Second question

24 By the second question, the national court asks whether, when an intermediary transaction falls within the scope of Article 28b(E)(3) of the Sixth Directive, it is necessary, for the purposes of determining the place where the underlying transaction was carried out, to refer to the general provisions of Article 8 of the Sixth Directive or to the specific provisions of Article 28b of that directive.

25 Suffice it to note that it follows from the wording of the Sixth Directive that the place of an intra-Community acquisition of goods is governed by Article 28b(A) and (B) of the directive, which derogates from the general provisions of Article 8 regulating the supply of goods within a Member State. A different assessment is not called for in the circumstances of the main case.

26 Accordingly, the second question is to be answered as follows: when an intermediary transaction falls within the scope of Article 28b(E)(3) of the Sixth Directive, it is necessary, for the purposes of determining the place where the transaction

underlying the supply of intermediary services was carried out, to refer to the provisions of Article 28b(A) and (B) of that directive.

Costs

27 The costs incurred by the Netherlands and Portuguese Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 14 February 2003, hereby rules:

1. Article 28b(E)(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, as amended by Council 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, is not to be interpreted as meaning that it covers only the services of intermediaries provided to a taxable person or to a non-taxable legal person for the purposes of value added tax.

2. **When an intermediary transaction falls within the scope of Article 28b(E)(3) of Sixth Directive 77/388, as amended, it is necessary, for the purposes of determining the place where the transaction underlying the supply of intermediary services was carried out, to refer to the provisions of Article 28b(A) and (B) of that directive.**

Jann Rosas La Pergola

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 27 May 2004.

Registrar

R. Grass

President of the First Chamber

P. Jann