JUDGMENT OF THE COURT (Fifth Chamber)

6 October 2011 *

In Case C-421/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 30 June 2010, received at the Court on 25 August 2010, in the proceedings

Finanzamt Deggendorf

v

Markus Stoppelkamp, acting in his capacity as insolvency administrator of the estate of Harald Raab,

THE COURT (Fifth Chamber),

composed of J.-J. Kasel (Rapporteur), President of the Chamber, E. Levits and M. Safjan, Judges,

Advocate General: J. Mazák,
Registrar: A. Calot Escobar,

* Language of the case: German.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the German Government, by C. Blaschke and T. Henze, acting as Agents,

— the Greek Government, by F. Dedousi, I. Pouli and I. Bakopoulos, acting as Agents,

— the European Commission, by W. Mölls and L. Lozano Palacios, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Article 21(1)(b) 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 2000/65/EC of 17 October 2000 (OJ 2000 L 269, p. 44) ('the Sixth Directive').

2 The reference has been made in proceedings between Mr Stoppelkamp, in his capacity as insolvency administrator of the estate of Mr Raab, and the Finanzamt Deggendorf (Deggendorf Tax Office; 'the Finanzamt'), relating to the determination of the person who is liable for the value added tax ('VAT') payable in respect of services provided by Mr Raab.

Legal context

European Union law

3 Article 4(1) of the Sixth Directive provides:

"'Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.'

4 Article 9(1) of the Sixth Directive provides:

'The 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.'

5 Article 9(2)(e) of the Sixth Directive provides:

'However:

…

(e) the place where the following services are supplied, when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

…

— the supply of staff,

…'

6 Article 21 of the Sixth Directive is worded as follows:

‘1. Under the internal system, the following shall be liable to pay value added tax:

(a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b) and (c).

Where the taxable supply of goods or of services is effected by a taxable person who is not established within the territory of the country, Member States may, under conditions determined by them, lay down that the person liable to pay tax is the person for whom the taxable supply of goods or of services is carried out;

(b) taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for value added tax purposes within the territory of the country to whom services covered by Article 28b(C), (D), (E) and (F) are supplied, if the services are carried out by a taxable person not established within the territory of the country;

…’

7 Article 1 of 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) (‘the Eighth Directive’) provides:

‘For 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, with the exception of:

(a) transport services and services ancillary thereto, exempted pursuant to Article 14(1)(i), Article 15 or Article 16(1), B, C and D of Directive 77/388/EEC;

(b) services provided in cases where tax is payable solely by the person to whom they are supplied, pursuant to Article 21(1)(b) of Directive 77/388/EEC.'

National legislation

8 Paragraph 1(1) No 1, first sentence, of the Law on turnover tax (Umsatzsteuergesetz 1999, BGBl. 1999 I, p. 1270), in the version applicable to the dispute in the main proceedings ('the UStG'), provides that 'supplies of goods and services effected for consideration within the territory of the country by a trader in the course of his business' are to be subject to turnover tax.

9 Paragraph 3a of the UStG provides:

‘(1) A supply of services is effected in the place from which the trader carries on his business, subject to Paragraphs 3b and 3f. If the supply is effected from a permanent establishment, the location of the establishment shall constitute the place of supply.

…

(3) Where the customer to whom one of the services mentioned in subparagraph 4 is supplied is a trader, by way of derogation from subparagraph 1, the service shall be deemed to be supplied in the place where that person carries on his business. If the service is supplied at the permanent establishment of a trader, the location of the permanent establishment shall instead be decisive. Where the person to whom one of the services listed in subparagraph 4 is supplied is not a trader and is resident or established in the territory of a third country, the service shall be deemed to be supplied at his place of residence or establishment …

(4) For the purposes of subparagraph 3, “services” shall mean:

…

7. the supply of staff;

…’

10 Paragraph 13b(4) of the UStG states:

'A trader established abroad is a trader who does not have his domicile, seat, head office, or any branch in the territory of the country, in Heligoland or in one of the territories listed in Paragraph 1(3). The relevant date is the date on which the service is supplied. If it is doubtful whether the trader fulfils those conditions, the person to whom the services are supplied shall not be liable to tax only if the trader can prove to him, by way of a certificate from the tax office responsible under the fiscal legislation for the taxation of his transactions, that he is not a trader within the meaning of the first sentence.'

The dispute in the main proceedings and the question referred

11 In the course of 2002, Mr Raab transferred the seat of his economic activity from Germany to Austria. He then declared, at two locations in Austria, that he was exercising a professional activity described as 'Überstellungs-, Administrations- und Fahrdienst' (transfer, administration and transport services). His economic activity consisted in the supply of his own staff to companies established in Lower Bavaria to perform transport services throughout Germany.

12 On 1 July 2002, Mr Raab also transferred his personal residence from Germany to Austria. However, according to the findings of the competent customs authorities, Mr Raab, even after this official change of residence, continued frequently to live in Germany.

13 The Austrian fiscal authorities issued a VAT identification number to Mr Raab. He invoiced his services to German transport companies exclusive of VAT with the statement 'the person to whom the services were supplied is liable for payment of tax in accordance with Paragraph 13b of the UStG'.

14 The Finanzamt took the view that the conditions for the reverse charge procedure imposing the tax liability on the customer under Paragraph 13b(1), No 1, first sentence, in conjunction with Paragraph 13b(4), were not met. According to the Finanzamt, Mr Raab was not a taxable person established abroad since his personal residence in the year at issue had been within the country. The Finanzamt therefore issued a VAT assessment notice to Mr Raab's address.

15 Mr Raab brought an action against that notice. The first-instance court upheld that action on the ground that, in 2002, the seat of Mr Raab's economic activity was in Austria. In the light of the provisions of Article 21(1)(a) of the Sixth Directive, Paragraph 13b of the UStG, it ruled, had to be interpreted as meaning that, in order for a taxable person to be established abroad, the place of the seat of the undertaking alone was relevant. Thus, where, as in the case before that court, such a seat existed, the existence, at the same time, of a personal residence within the country was irrelevant.

16 In support of its appeal on a point of law ('Revision') to the Bundesfinanzhof (Federal Finance Court), the Finanzamt submits that the first-instance court infringed Paragraph 13b(4) of the UStG, which, in its view, makes it clear that a trader cannot be considered to be established abroad if he is resident within the country.

17 The Bundesfinanzhof expresses doubts as to whether the German legislation is compatible with European Union law because, according to that German legislation, the criterion of 'trader established abroad', laid down as a condition for the application

of the reverse charge procedure, is not satisfied where the trader has established his business outside Germany, but has a personal residence within Germany. Under Article 21(1)(b) of the Sixth Directive, it is sufficient, in order for the taxable person to whom the services are supplied to be liable for payment of the VAT, that the services be supplied by an 'im Ausland ansässigen Steuerpflichtigen' (taxable person not established within the country). However, that concept is not defined in Article 21 of the Sixth Directive or in any other provision of that directive.

18 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a taxable person to be regarded as "a taxable person established abroad" within the meaning of Article 21(1)(b) of [the Sixth Directive] simply because the place where he has established his business is abroad, or is it an additional requirement that his personal residence must also be abroad?'

The question referred for a preliminary ruling

19 First, it must be noted that it is apparent from a combined reading of, in particular, the French- and German-language versions of Article 21(1)(b) of the Sixth Directive that the German-language version does not, in this instance, employ the terms 'taxable person who is not established within the territory of the country'. That version uses the terms 'im Ausland ansässigen Steuerpflichtigen', the literal translation of which is to be understood as 'taxable person established abroad'.

20 The question referred must therefore be construed as asking, essentially, whether Article 21(1)(b) of the Sixth Directive must be interpreted as meaning that, in order to be considered an 'im Ausland ansässigen Steuerpflichtigen' (taxable person who is not established within the territory of the country), within the meaning of the German-language version of that provision, it is sufficient for the taxable person to have established the seat of his economic activity outside the country or whether, in addition, his personal residence must not be within the territory of the country.

21 In that regard, it should be pointed out, as the referring court has done, that there is no definition in the German-language version of the Sixth Directive of the concept of 'taxable person established abroad'.

22 However, it must be stated that the concept in question featured, prior to the amendments introduced by Directive 2000/65, not only in the German-, but also, in particular, in the Spanish-, Danish-, English-, French-, Italian-, Dutch-, Portuguese- and Swedish-language versions of Article 21(1)(b) of the Sixth Directive. Following the entry into force of that amending directive, all of those language versions now employ, in contrast to the German-language version, the concept corresponding to that of 'taxable person who is not established within the territory of the country'.

23 That concept, unlike that used in the German-language version of the Sixth Directive, not only features in other provisions of the latter, including Article 17(4), but has also been defined in a separate provision of European Union law.

24 Article 1 of the Eighth Directive defines the concept of 'taxable person not established within the territory of the country' (judgment of 16 July 2009 in Case C-244/08 *Commission* v *Italy*, paragraph 26).

25 For the purposes of that article, the status of taxable person not established within the territory of the country presupposes that the taxable person does not display in that country, during the reference period, any of the connecting factors identified therein (see, to that effect, *Commission* v *Italy*, paragraph 27).

26 Foremost among those factors are the seat of the economic activity and the existence of a fixed establishment from which business transactions are effected (see, to that effect, *Commission* v *Italy*, paragraph 28).

27 As is apparent from the wording of Article 1 of the Eighth Directive, the other connecting factors there enumerated, namely the domicile or normal place of residence of the taxable person, can be relied on to determine where the taxable person is considered to be 'established' only in the absence of relevant information concerning the seat of the economic activity or the fixed establishment from which business transactions are carried out.

28 It follows that, in a situation such as that at issue in the main proceedings, which is characterised, on the one hand, by the fact that the seat of the economic activity of the taxable person is known and is located outside the country of the customer and, on the other, by the circumstance that it is not disputed that this is the actual, genuine seat and not a fictitious seat or presence, any personal residence which the taxable person may have within the country cannot be taken into account.

29 That conclusion is, moreover, consistent with the Court's case-law relating to the determination, in the area of VAT, of a company's place of business, in particular its judgment in Case C-73/06 *Planzer Luxembourg* [2007] ECR I-5655 concerning the

interpretation of Article 1 of Thirteenth Council Directive 86/560/EEC of 17 November 1986 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 Community territory (OJ 1986 L 326, p. 40).

30 As the Court held at paragraph 61 of that judgment, determination of a company's place of business requires a series of factors to be taken into consideration, foremost among which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined.

31 Other factors, such as the place of residence of the main directors and the place where general meetings are held, may also need to be taken into account during a second phase, for example when determining the effective place of business of a company exhibiting a fictitious presence, such as that of a 'letter-box' company (see, to that effect, *Planzer Luxembourg*, paragraphs 61 and 62).

32 An interpretation according to which, in the context of the determination of the place of establishment of the taxable service provider, the latter's personal residence can be taken into account only in the absence of connecting factors directly linked to the economic activity carried on by that service provider, such as the seat of the economic activity or the existence of a fixed establishment from which business transactions are effected, is also consistent with the logic underpinning Article 4(1) of the Sixth Directive, in that that provision defines the taxable person only by reference to the economic activity which he performs.

33 It should be added that the objective of Article 21(1)(b) of the Sixth Directive is to release the taxable person established in one Member State from the requirement to respect the obligations flowing from Article 22 of that directive in other Member States in which he supplies goods or provides a service. Excluding the reverse charge procedure in a case such as that at issue in the main proceedings would have the effect of seriously compromising the attainment of that objective.

34 Moreover, as the referring court has noted, the foregoing interpretation is that which offers the greatest legal certainty in so far as the presumption that the services are provided by a 'taxable person not established within the territory of the country' when the seat of that person's economic activity is located outside that country, wherever his personal residence may be, is such as to simplify the application of the provisions of the Sixth Directive and, therefore, contributes to ensuring accurate and reliable collection of VAT.

35 Indeed, that presumption allows the customer established in a country, who is aware that the supplier has the seat of his economic activity outside that country, as is the case in the main proceedings, to avoid having to undertake research concerning the personal residence of that supplier.

36 In the light of the foregoing considerations, the answer to the question referred is that Article 21(1)(b) of the Sixth Directive must be interpreted as meaning that, in order for him to be considered a 'taxable person who is not established within the territory of the country', it is sufficient that the taxable person should have established the seat of his economic activity outside that country.

Costs

37 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 (Fifth Chamber) hereby rules:

Article 21(1)(b) 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 2000/65/EC of 17 October 2000, must be interpreted as meaning that, in order for him to be considered a 'taxable person who is not established within the territory of the country', it is sufficient that the taxable person should have established the seat of his economic activity outside that country.

[Signatures]