JUDGMENT OF THE COURT (First Chamber)

6 November 2008 *

In Case C-291/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Regeringsrätten (Sweden), by decision of 30 May 2007, received by the Court on 15 June 2007, in the proceedings

Kollektivavtalsstiftelsen TRR Trygghetsrådet

v

Skatteverket,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet (Rapporteur) and E. Levits, Judges,

Advocate General: J. Mazák,
Registrar: R. Grass,

* Language of the case: Swedish.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Skatteverket, by M. Loeb, acting as Agent,

— the German Government, by M. Lumma and C. Blaschke, Agents,

— the Greek Government, by S. Spyropoulos and I. Bakopoulos, and by I. Pouli, Agents,

— the Italian Government, by I. M. Braguglia, Agent, and by G. de Bellis, avvocato dello Stato,

— the Polish Government, by T. Nowakowski, Agent,

— the Commission of the European Communities, by D. Triantafyllou and P. Dejmek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 June 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(2) 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 1999/59/EC of 17 June 1999 (OJ 1999 L 162, p. 63; 'the Sixth Directive'), and of Article 56(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The reference has been made in proceedings between Kollektivavtalsstiftelsen TRR Trygghetsrådet (Restart — Council for redundancy support and advice; 'TRR'), a Swedish foundation which carries out both economic and other activities, and the Skatteverket (Swedish local tax board), concerning the tax consequences of the supply of certain consultancy services which TRR wishes to obtain and whether TRR must be regarded as a trader within the meaning of Chapter 5, Paragraph 7, of Law 1994:200 on value added tax (mervärdesskattelagen (1994:200); 'the ML'). The dispute relates to a period during which the Sixth Directive and Directive 2006/112 were successively applicable.

Legal context

Community legislation

3 Under point (1) of Article 2 of the Sixth Directive (essentially reproduced in Article 2(1)(a) of Directive 2006/112), 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to value added tax ('VAT').

4 Under Article 4(1) of the Sixth Directive (essentially reproduced in the first subparagraph of Article 9(1) of Directive 2006/112), 'taxable person' means 'any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'.

5 Article 4(2) of the Sixth Directive (essentially reproduced in the second subparagraph of Article 9(1) of Directive 2006/112) provides that '[t]he economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity'.

6 Under Article 9(1) of the Sixth Directive (essentially reproduced in Article 43 of Directive 2006/112), '[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'.

7 However, Article 9(2)(e) of the Sixth Directive (essentially reproduced in Article 56(1)(c) of Directive 2006/112) provides that '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:

...

— services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information,

…'

8 Under point (1)(b) of Article 21 of the Sixth Directive, VAT is payable by 'taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for [VAT] 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 established abroad; however, Member States may require that the supplier of services shall be held jointly and severally liable for payment of the tax'.

9 Article 196 of Directive 2006/112 provides that 'VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied …'.

National legislation

10 Chapter 1, Paragraph 1, of the ML provides that VAT is payable on supplies of goods and services made within the territory of the country which are carried out as part of a business activity. That provision is intended to implement point (1) of Article 2 of the Sixth Directive.

11 Chapter 5, Paragraph 7, of the ML provides that where certain services listed therein — including consultancy services — are supplied from another Member State, they are to be regarded as supplied within the territory of the country if the customer is a trader who has his place of business in Sweden or a fixed establishment there for which the services were supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides. Under Chapter 1, Paragraph 2, of the ML, if the supplier of the consultancy services on which VAT is payable is a foreign company, the VAT is to be payable by the customer. Those provisions implement the corresponding provisions laid down in Article 9(2)(e) and point (1)(b) of Article 21 of the Sixth VAT Directive.

12 The ML does not define 'trader'. However, Chapter 4, Paragraph 1, of the ML states that any activity which constitutes economic activity within the meaning of Chapter 13 of Law 1999:1229 on income tax (inkomstskattelagen (1999:1229)), or any activity which is carried out in a similar form and which, in the course of a single tax year, generates income in excess of SEK 30 000, is to be regarded as a 'business activity'. It is clear from Chapter 13, Paragraph 1, of Law 1999:1229 on income tax that 'economic activity' means any activity carried out, independently, on a commercial basis.

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

13 The dispute in the main proceedings concerns TRR, a foundation for collective agreements which was set up in 1994 by the Svenska Arbetsgivareföreningen (now Svenskt Näringsliv), the Swedish employers' confederation, and the Privattjänstemannakartellen (federation of salaried employees in the private business sector), a trade union.

14 According to its statutes, the objects of TRR are, on the one hand, the provision of severance pay and the promotion of any measures likely to facilitate the occupational redeployment of employees who, for certain reasons, have lost their jobs or who run that risk and, on the other, the provision of advice and assistance to companies which are in a situation of over-manning, or likely to find themselves in such a situation, and the promotion of human resources management training for companies. The rules governing the conduct of TRR's activities are set out in more detail in an agreement between Svenskt Näringsliv and Privattjänstemannakartellen, called 'the omställningsavtalet' ('the redeployment agreement').

15 TRR's activities are financed through contributions paid by the employers who are party to the omställningsavtalet, which correspond to a percentage of the remuneration paid to the employees covered by the omställningsavtalet. Employers who are bound by the omställningsavtalet under a 'side agreement' pay a fixed yearly contribution. In addition to the activities carried out under the omställningsavtalet, TRR supplies services to businesses wishing to operate through outsourcing, for which it is registered as a taxable person for VAT purposes and which account for approximately 5% of its income.

16 TRR intends to purchase consultancy services supplied, inter alia, by a service provider established in Denmark, which are to be used exclusively in the context of TRR's activities under the omställningsavtalet. In order to obtain clarification of the tax consequences of that transaction, TRR sought a preliminary decision from the Skatterättsnämnden (Revenue Law Commission) in order to resolve the question whether its activities under the omställningsavtalet are of a commercial nature and whether it is to be regarded as a trader for the purposes of Chapter 5, Paragraph 7, of the ML.

17 By decision of 3 March 2006, the Skatterättsnämnden ruled that TRR's activities under the omställningsavtalet do not constitute a supply of services in the course

of a business activity, but that TRR is to be regarded as a trader for the purposes of Chapter 5, Paragraph 7, of the ML.

18 TRR has appealed against the decision of the Skatterättsnämnden, claiming that the Regeringsrätten should declare that TRR is not a trader for the purposes of Chapter 5, Paragraph 7, of the ML. The Skatteverket contends that the Regeringsrätten should confirm the contested decision.

19 In support of its action, TRR submits, inter alia, that registration as a taxable person for VAT purposes does not of itself mean that the registered party is always to be regarded as a trader for the purposes of Chapter 5, Paragraph 7, of the ML. When making purchases for activities which fall outside the scope of the Sixth Directive, it is not a trader for the purposes of that provision. TRR adds that the corresponding provision in the Sixth Directive — Article 9(2)(e) — does not refer to a trader but to a taxable person.

20 The Regeringsrätten considers it necessary, for the purposes of applying certain provisions of the Sixth Directive and of Directive 2006/112 in the dispute before it, for the terms 'taxable person' and 'person liable for payment of the tax' to be interpreted in the light of Community law. The Regeringsrätten notes that the Court has interpreted the term 'taxable person', as used in the Sixth Directive, in many judgments, but that it has not yet given a ruling as to how that term is to be understood for the purposes of applying Article 9(2)(e) of the Sixth Directive in a specific situation, such as the circumstances of the case before the referring court.

21 On the view that the relevant provisions of the Sixth Directive and of Directive 2006/112 are unclear and that the issue does not yet appear to have been referred to the Court, the Regeringsrätten has decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Article 9(2)(e) and [point (1)(b) of Article 21] of the Sixth … Directive and Articles 56(1)(c) and 196 of [Directive 2006/112] to be interpreted as meaning that a person who acquires consultancy services from a person liable to tax in another [Member State], [in cases where the former] carries out both an economic activity and also an activity which falls outside the scope of the directives, is to be regarded as a taxable person … where those articles are applied, even though the acquisition was made solely in respect of the latter activity?'

The question referred

22 By its question, the referring court is essentially asking whether Article 9(2)(e) of the Sixth Directive and Article 56(1)(c) of Directive 2006/112 are to be interpreted as meaning that where the customer for consultancy services supplied by a taxable person established in another Member State carries out both an economic activity and an activity which falls outside the scope of those directives, that customer is to be regarded as a taxable person even where the supply is used solely for the purposes of the latter activity.

23 It should be borne in mind that the wording of Article 9(2)(e) of the Sixth Directive is, essentially, identical to that of Article 56(1)(c) of Directive 2006/112. It follows that those two provisions must be interpreted in the same way.

24 It should also be borne in mind that Article 9 of the Sixth Directive contains rules for determining the place where services are deemed to be supplied for VAT purposes. Whereas Article 9(1) lays down a general rule in that regard, Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied. The object of those provisions is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation (see Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20; Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraph 10; Case C-452/03 *RAL (Channel Islands) and Others* [2005] ECR I-3947, paragraph 23; and Case C-114/05 *Gillan Beach* [2006] ECR I-2427, paragraph 14).

25 It is appropriate also to note that, as regards the relationship between paragraphs 1 and 2 of Article 9 of the Sixth Directive, the Court has held that Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether that situation is covered by one of the instances mentioned in Article 9(2) of that directive. If not, it falls within the scope of Article 9(1) (*Dudda*, paragraph 21; *Linthorst, Pouwels en Scheres*, paragraph 11; *RAL (Channel Islands) and Others*, paragraph 24; and *Gillan Beach*, paragraph 15).

26 Article 9(2)(e) of the Sixth Directive provides that the place where services of consultants and other similar services are supplied for taxable persons who are established in the Community, but not in the same country as the supplier, is the place where the customer has established his business.

27 Although it is true that in the case before the referring court, the customer for the consultancy services is established within the Community but outside the country of the service supplier, the referring court asks nevertheless whether that customer must also be regarded as a taxable person for the purposes of Article 9 of the Sixth Directive where the services concerned are used only for activities which fall outside the scope of the Sixth Directive and that of Directive 2006/112.

28 It should be noted at the outset that Article 9(2)(e) of the Sixth Directive does not specify whether it applies only if the taxable person receiving the supply of services uses those services for the purposes of his economic activity. Thus, unlike other provisions of the Sixth Directive, such as Articles 2(1) and 17(2), Article 9(2)(e) does not indicate that such a condition must be satisfied in order for it to apply.

29 In other words, in the absence of any express provision in Article 9(2)(e) of the Sixth Directive that the services supplied must be used for the purposes of the customer's economic activity, it must be concluded that the fact that the customer uses those services for activities which fall outside the scope of the Sixth Directive does not preclude the application of that provision.

30 Such an interpretation is consistent with the objective pursued by Article 9 of the Sixth Directive, which — as was pointed out in paragraph 24 of the present judgment — is to lay down a conflict of laws rule to avoid the risk of double taxation or non-taxation.

31 In the same way, as the Advocate General observed in point 41 of his Opinion, that interpretation facilitates the implementation of that conflict of laws rule, in that it serves the interests of simplicity of administration — of the rules on the place of supply of services — as regards the rules governing the collection of taxes and the prevention of tax avoidance. The supplier of services need merely establish that the customer is a taxable person in order to ascertain whether the place of supply of services is in the Member State in which he, the supplier, is established or in the Member State in which the customer's activities are based.

32 Furthermore, that interpretation is in line with the objectives and operating rules of the Community VAT system since it ensures, in a situation such as that at issue in the main proceedings, that the ultimate consumer of the supply of services bears the final cost of the VAT payable.

33 As the Advocate General observed in points 43 and 44 of his Opinion, such an interpretation is also consistent with the principle of legal certainty; furthermore, it enables the burden on traders operating across the internal market to be reduced and facilitates the free movement of services.

34 Finally, it should be noted that point (1)(b) of Article 21 of the Sixth Directive (essentially reproduced in Article 196 of Directive 2006/112) provides that VAT is payable by persons to whom services covered by Article 9(2)(e) of the Sixth Directive (essentially reproduced in Article 56(1)(c) of Directive 2006/112) are supplied. Accordingly, if the conditions for the application of Article 9(2)(e) of the Sixth Directive are met, the purchaser is liable for VAT on the supply of services which he receives, whether or not they have been supplied for the purposes of activities which fall outside the scope of those directives.

35 In the light of the foregoing considerations, the answer to the question referred by the Regeringsrätten must be that Article 9(2)(e) of the Sixth Directive and Article 56(1)(c) of Directive 2006/112 must be interpreted as meaning that where the customer for consultancy services supplied by a taxable person established in another Member State carries out both an economic activity and an activity which falls outside the scope of those directives, that customer is to be regarded as a taxable person even where the supply is used solely for the purposes of the latter activity.

Costs

36 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 (First Chamber) hereby rules:

Article 9(2)(e) 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 1999/59/EC of 17 June 1999, and Article 56(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that where the customer for consultancy services supplied by a taxable person established in another Member State carries out both an economic activity and an activity which falls outside the scope of those directives, that customer is to be regarded as a taxable person even where the supply is used solely for the purposes of the latter activity.

[Signatures]