JUDGMENT OF THE COURT (Fifth Chamber)

5 June 2003 *

In Case C-438/01,

REFERENCE to the Court under Article 234 EC by the Cour de cassation (Luxembourg) for a preliminary ruling in the proceedings pending before that court between

Design Concept SA

and

Flanders Expo SA,

on the interpretation of 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 (OJ 1977 L 145, p. 1),

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, A. La Pergola and S. von Bahr (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Design Concept SA, by M. Di Stefano, avocat,

— the French Government, by G. de Bergues and P. Boussaroque, acting as Agents,

— the Commission of the European Communities, by E. Traversa and C. Giolito, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Design Concept SA, represented by M. Di Stefano, of the Greek Government, represented by V. Kyriazopoulos and S. Chala, acting as Agents, and of the Commission, represented by C. Giolito, at the hearing on 14 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2002,

gives the following

Judgment

1 By judgment of 8 November 2001, received at the Court on 13 November 2001, the Cour de cassation (Court of Cassation) (Luxembourg) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of 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 (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 That question was raised in the course of proceedings between Flanders Expo SA ('Flanders Expo'), a company incorporated under Belgian law, established in Ghent (Belgium), and Design Concept SA ('Design Concept'), a company incorporated under Luxembourg law, established in Hesperange (Luxembourg), concerning the refusal of the latter to pay value added tax ('VAT') on services which had been supplied to it.

Community legislation

3 The seventh recital in the preamble to the Sixth Directive states:

'Whereas the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member

States, in particular as regards supplies of goods for assembly and the supply of services; whereas although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods'.

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

'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:

'[T]he 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:

...

— advertising services,

...'

The main proceedings and the question referred for a preliminary ruling

6 In connection with a trade fair known as 'Horeca', organised in Ghent for professionals in the hotel and catering business, Design Concept, acting for the Luxembourg Ministry of Economic Affairs, commissioned from Flanders Expo various services including the construction of two stands, the cleaning of those stands during the exhibition and the provision of staff to transport equipment.

7 Flanders Expo submitted an invoice to Design Concept for the price of its services, including in it the amount of VAT. However, Design Concept excluded the amount of VAT from its payment on the ground that since the services supplied were advertising services and the recipient of those services, Design Concept, was not situated in the same Member State as the supplier, Flanders Expo, the place where the services were supplied was where the customer was established, that is to say Luxembourg, in accordance with the rule laid down in Article 9(2)(e) of the Sixth Directive. Design Concept therefore took the view that it was not obliged to pay the VAT claimed from it by Flanders Expo in Belgium.

8 Flanders Expo brought an action before the Tribunal de paix (Magistrates' Court) (Luxembourg) which upheld its claim for payment of VAT. On appeal the Tribunal d'arrondissement (District Court) (Luxembourg) confirmed the decision at first instance, holding, contrary to the interpretation put forward by Design Concept, that the services supplied by Flanders Expo are not advertising services and that the general rule on the place of taxation laid down in Article 9(1) of the Sixth Directive is applicable. According to that rule the place where a service is supplied is the place from which the service is performed, in this case Belgium.

9 The Cour de cassation, to which Design Concept appealed, takes the view that the lower courts were probably wrong to refuse to treat the services supplied by Flanders Expo as advertising services. However, it is uncertain whether their decision is justified on another ground based on the interpretation of Article 9(2)(e) of the Sixth Directive, read in the light of the seventh recital in the preamble thereto.

10 After having recalled the terms of the seventh recital, the Cour de cassation states that if incorporation in the price of the goods of the cost of advertising services were an essential condition for the transfer of taxation to the customer's country, the decision of the lower courts would then be justified, given that in the present case the cost of those services is borne ultimately not by a trader, but by the Luxembourg State which, as the advertiser, commissioned those services from the intermediate customer.

11 Since it was uncertain of the answer to the question of Community law raised by the appeal before it, the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is 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 concerning "advertising services" applicable to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser, if the advertiser does not produce goods in the price of which the cost of the services is going to be included?'

Preliminary observations

12 In its order for reference, the Cour de cassation states that, '*prima facie*', the lower courts did not correctly interpret the concept of 'advertising services' referred to in the second indent of Article 9(2)(e) of the Sixth Directive. The question raised by the Cour de cassation is thus founded on the premiss that the services supplied by Flanders Expo are 'advertising services' within the meaning of that provision.

13 However, although it does not form the subject-matter of a question referred for a preliminary ruling, the nature of the services supplied by Flanders Expo has given rise to a considerable number of observations from Design Concept, the French Government and the Commission.

14 In that regard, it should be remembered that it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38).

15 Thus, in the present case the answer to the sole question referred must proceed from the premiss taken as a basis by the national court, namely that the services in question in the main proceedings are advertising services. Nevertheless, in so far as that premiss is based on a finding that the Cour de cassation itself describes as 'prima facie', it is necessary to point out that the notion of 'advertising services' referred to in the second indent of Article 9(2)(e) of the Sixth Directive is a

Community law concept which must be interpreted uniformly (see, *inter alia*, Case C-69/92 *Commission* v *Luxembourg* [1993] ECR I-5907, paragraph 15) and that it will be for the national court, where necessary, to determine the classification of the services concerned in the light of the case-law of the Court.

The question referred for a preliminary ruling

16 By its question the national court seeks essentially to ascertain, first, whether Article 9(2)(e) of the Sixth Directive must be interpreted as applying to advertising services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser and, second, whether that provision is applicable where the advertiser does not produce goods or services in the price of which the cost of the advertising services may be included.

The first part of the question

17 In accordance with the case-law of the Court, the second indent of Article 9(2)(e) of the Sixth Directive must be interpreted as applying not only to advertising services supplied directly and invoiced by the supplier to a taxable advertiser, but also to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser (Case C-108/00 *SPI* [2001] ECR I-2361, paragraph 22).

18 It follows that the indirect nature of the services, resulting from the fact that they were supplied and invoiced by a first supplier to an undertaking, which was itself commissioned to perform advertising services, before being invoiced by that undertaking to the advertiser, does not constitute an obstacle to the application of Article 9(2)(e) of the Sixth Directive.

The second part of the question

19 Design Concept and the Commission argue that the fact that the advertiser, that is the Luxembourg Ministry of Economic Affairs in the main proceedings, does not produce goods or supply services in the price of which the cost of the services may be included is not relevant to the resolution of this dispute.

20 They take the view that the relationship between the first supplier and the intermediate recipient of the services must be considered independently of the relationship between that intermediate customer and the advertiser. It is, therefore, not necessary to examine the status of the final customer, in this case the advertiser, or, in particular, to ascertain whether it is itself a taxable person and therefore capable of passing on the cost of the services received in the price of the goods or services which it supplies.

21 The French Government takes the contrary view that, if the final recipient of the services does not include the sum paid in consideration for those services in the price of any goods or service which it sells, the rule provided in Article 9(2)(e) of the Sixth Directive is not applicable.

22 In that regard, as is apparent from the seventh recital in the preamble to the Sixth Directive, Article 9 of the directive lays down the rules for determining the place where taxable transactions are effected, for the purpose of avoiding conflicts concerning jurisdiction.

23 Moreover, according to the fundamental principle which underlies the VAT system, VAT applies to each transaction by way of supply of goods or services after deduction has been made of the VAT which has been levied directly on transactions relating to inputs (see, in particular, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 16).

24 Therefore, the rules for determining the place where a taxable transaction is effected, laid down in Article 9 of the Sixth Directive, must be applied to each transaction by way of supply of services.

25 Thus, in a case such as that in the main proceedings the rule laid down in Article 9(2)(e) of the Sixth Directive must be applied to the services supplied by the first supplier to the intermediate customer.

26 Under Article 9(1) and (2), the determination of the place where a service is supplied depends solely on the place where the supplier and the recipient of the service in question are established. That article in no way requires account to be taken of transactions carried out after that first supply of services.

27 As the Advocate General points out in paragraphs 22 to 33 of his Opinion, the seventh recital in the preamble to the Sixth Directive does not lead to a different interpretation from that which results from paragraphs 24 to 26 of the present judgment.

28 It follows that in a case of an indirect supply of services, such as that at issue in the main proceedings, involving a first supplier of services, an intermediate customer and an advertiser who receives services from the intermediate customer, the transaction by way of supply of services effected by the first supplier to the intermediate customer must be considered separately, for the purpose of determining the place of taxation of that transaction. The rule laid down in the second indent of Article 9(2)(e) of the Sixth Directive applies, as a rule, if the intermediate customer, as recipient of the advertising services, is a taxable person established in a Member State other than that in which the first supplier is based. It is not necessary to determine whether the advertiser, who is the final recipient of the services, is also a taxable person who includes the cost of those services in the price of goods or services supplied by him.

29 The answer to the question referred must therefore be that Article 9(2)(e) of the Sixth Directive must be interpreted as applying to advertising services supplied indirectly to the advertiser and invoiced to an intermediate customer who in turn invoices them to the advertiser. The fact that the advertiser does not produce goods or services in the price of which the cost of the advertising services may be included is not relevant for the purpose of determining the place where the services are supplied to the intermediate customer.

Costs

30 The costs incurred by the Greek and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Cour de cassation by judgment of 8 November 2001, 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 must be interpreted as applying to advertising services supplied indirectly to the advertiser and invoiced to an intermediate customer who in turn invoices them to the advertiser. The fact that the advertiser does not produce goods or services in the price of which the cost of the advertising services may be included is not relevant for the purpose of determining the place where the services are supplied to the intermediate customer.

Wathelet **Timmermans** **Edward**

La Pergola von Bahr

Delivered in open court in Luxembourg on 5 June 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber