JUDGMENT OF THE COURT (Sixth Chamber)

6 November 2003 *

In Joined Cases C-78/02 to C-80/02,

REFERENCES to the Court under Article 234 EC by the Diikitiko Efetio Athinon (Greece) for a preliminary ruling in the proceedings pending before that court between

Elliniko Dimosio

and

Maria Karageorgou (C-78/02),

Katina Petrova (C-79/02),

Loukas Vlachos (C-80/02),

on the interpretation 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

* Language of the case: Greek.

(OJ 1977 L 145, p. 1) and in particular the rule in Article 21(1)(c) of that directive to the effect that VAT is payable by any person who mentions VAT on an invoice,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Greek Government, by M. Apessos and S. Detsis, acting as Agents,

— Mrs Karageorgou, by E. Metaxaki and P. Yatagantzidis, lawyers,

— Mrs Petrova and Mr Vlachos, by A. Koutsolampros, lawyer,

— the Commission of the European Communities, by E. Traversa and H. Tserepa-Lacombe, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Greek Government, Mrs Karageorgou and the Commission at the hearing on 20 March 2003,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2003,

gives the following

Judgment

1 By orders of 31 January 2002, received at the Court on 11 March 2002, the Diikitiko Efetio Athinon (Administrative Court of Appeal, Athens) (Greece) referred to the Court for a preliminary ruling under Article 234 EC two questions in each case, in the same terms, on the interpretation 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) and in particular the rule in Article 21(1)(c) of that directive to the effect that VAT is payable by any person who mentions VAT on an invoice.

2 Those questions were raised in proceedings between Elliniko Dimosio (the Greek State) and translators working for the Greek Ministry of Foreign Affairs who claim to have invoiced VAT in error and are claiming recovery thereof.

Legal framework

Community legislation

3 Under Article 2(1) of the Sixth Directive supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such are subject to value added tax.

4 Article 4 of the Sixth Directive provides

'1. "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.

2. The 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....

...

4. The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

...

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

...'

5 Article 21(1)(c) of the Sixth Directive provides:

'The following shall be liable to pay value added tax:

1. under the internal system:

...

(c) any person who mentions the value added tax on an invoice or other document serving as invoice'.

National legislation

6 Pursuant to Article 2(1) of Law 1642/1986 on the application of value added tax and other provisions (A.125), prior to its replacement by Article 1(1)(a) of Law 2093/1992 (A.181), value added tax is payable on, inter alia, 'the supply of goods and services, provided such supply is for taxation purposes within the territory by taxable persons operating in that capacity'.

7 Pursuant to Article 3(1) of Law 1642/1986, prior to its replacement by Article 1 of Law 2093/1992, 'every physical or legal person or corporate body, whether national or foreign, shall be subject to the tax, provided they are engaged in independent economic activity, irrespective of the place of establishment, the purpose or the result of such activity. Salaried employees and other physical persons bound to their employer by a contract of employment or any other legal ties creating the relationship of employer and employee as regards conditions of employment, remuneration and employer's liability shall not be regarded as carrying on an independent economic activity'.

8 Finally, Article 28(1) thereof, prior to its replacement by Article 1(42) of the abovementioned Law 2093/1992, provides:

'In respect of the supply of goods and services, the following shall be liable to the tax: (a) taxable persons established in the territory in respect of activities performed by those persons,... (d) any other persons who mention the tax on invoices or on other similar documents issued by them...'.

The main proceedings and questions referred

Case C-78/02

9 By Decision no F.093.23 of 12 April 1988 of the Secretary-General of the Ministry of Foreign Affairs, Mrs Maria Karageorgou was appointed as a translator from Greek into English to carry out work for the Translation Department of that Ministry.

10 In respect of that activity, the plaintiff submitted to Mr Cholargos, the Head of the Dimosia Oikonomiki Ypiresia (Financial Services Directorate, hereinafter the 'DOY'), provisional tax statements and a statement of account for VAT for the 1992 financial year. She subsequently retracted those statements by request No 22240/29.12.1994, and sought reimbursement of the VAT on the basis that it had been unduly paid.

11 In support of her retraction she claimed that she had submitted the statements in question on the basis of an error in law given that she is not liable to VAT for income earned as a translator.

12 In her claim she contends that she was in an employer-employee relationship with the Ministry of Foreign Affairs with regard to her working conditions and pay. First, she did not herself determine her remuneration. Secondly, the Ministry of Foreign Affairs was liable to third parties for any acts or omissions on her part as a translator. Further, the abovementioned VAT paid in accordance with her statements for 1992 was not passed on to the consumer, given that neither she nor the ministry charged those amounts to the private or legal persons for whom those translations were intended, with the result that those amounts constitute part of her earnings and not tax.

13 In reply No 22240-22241/9.2.1995, the Head of the DOY rejected the applicant's claim on the ground, first, that her working conditions were not the same as those of salaried staff and, secondly, that the VAT had been lawfully paid by Mrs Karageorgou since she had mentioned it on the receipts which she had issued for the provision of her services to the Ministry of Foreign Affairs and that she was therefore not entitled to reimbursement of the tax paid.

14 In its judgment no 275/1995 the President of the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens) (Greece) allowed the application by Mrs Karageorgou and her request to retract the VAT statements for 1992, set aside negative reply No 22240-22241/9.2.1995 of the Head of the DOY, and ordered reimbursement of the amount of tax paid by the applicant. That judgment was based on reasoning to the effect that translators operate as organs of the State, which has sole liability for their acts and omissions given that the translations provided by them are public documents, and that Mrs Karageorgou operated, in the performance of her work, under an employer-employee relationship as regards the terms governing her work and remuneration.

15 The Greek State appealed against that ruling to the Diikitiko Efetio Athinon, contending, inter alia, as it had done at first instance, that the respondent, irrespective of the nature of her work, was liable to pay the contested tax in compliance with Article 28(1)(d) of Law 1642/1986 on the ground that she had mentioned VAT on the receipts issued in respect of the period in question.

16 By judgment no 90/1996, the President of the Diikitiko Efetio Athinon upheld the ruling at first instance and rejected the appeal as unfounded. It did not, however, examine the ground of appeal concerning the fact that Mrs Karageorgou had mentioned VAT on the receipts issued during the period in question.

17 The Greek State, relying on the abovementioned omission, sought annulment of the judgment of the Diikitiko Efetio Athinon before the Simvoulio tis Epikratias (Council of State) (Greece).

18 By judgment no 1659/1999 the Simvoulio tis Epikratias set aside the judgment of the lower court in so far as it concerned the appeal plea based on the issue of a receipt mentioning VAT, taking the view that that appeal plea was material and that the appellate court therefore had erred in omitting to examine it, and remitted the case to the court below for a fresh determination.

Cases C-79/02 and C-80/02

19 In Cases C-79/02 and C-80/02, concerning Mrs Petrova and Mr Vlachos respectively, the facts and main proceedings are analogous to those in Case C-78/02.

Questions referred

20 The Diikitiko Efetio Athinon decided to stay the proceedings and to refer to the Court in each of the cases before it the following questions:

'(1) Is it possible to characterise as VAT, within the meaning of the provisions of the Sixth VAT Directive (77/388/EEC), the amount mentioned on an invoice by a person who provides services to the State as a salaried employee, when the person providing those services mistakenly considers that he is providing services to the State as a self-employed person whilst, in reality, he is an employee and, on the recommendation of his employer, charges VAT on the invoices issued by him and not on his total earnings received from the State, which in law constitute the tax basis of assessment to VAT, subsequently

collected from his earnings, but where the amount thereof is determined on the earnings by means of an internal deduction method and the earnings are regarded as containing the amount of VAT owed, while the State reduces the amount of legitimate earnings paid to that person by the element of VAT they are calculated to contain?

(2) Can there be a departure from the formal principle governing the tax as set out in Article 21(1)(c) of the Sixth VAT Directive (77/388/EEC) (that is to say, where VAT is mentioned on the invoice or other document serving as invoice, such tax is payable to the State), where the State, in performing that activity in pursuance of its public authority, is under Article 4(5) of the above directive not subject to tax, so as to render the mechanism of deductions inapplicable thereto, and the said tax cannot be and is not passed on to the end consumer (namely, the individual who contracts with the State for the translation of documents), the provider of services being entitled to reimbursement of the tax paid to the tax authority after deduction of any input tax in order to avoid the State's enrichment as a result thereof?'

21 By order of the President of the Court of 14 May 2002 Cases C-78/02, C-79/02 and C-80/02 were joined for the purposes of the written and oral procedure and for the judgment.

First question

Observations submitted to the Court

22 The Greek Government states that a translation service was set up within the Ministry of Foreign Affairs for the official translation of public and private

documents. Any person wishing to obtain a translation would lodge the text to be translated with that service, at the same time paying the appropriate fee laid down by that ministry, and a receipt would be issued to him. The amount of that fee included both remuneration in respect of the translation and the corresponding VAT although the latter is not mentioned separately.

23 The Ministry's translation service would then forward the texts to private persons — independent translators. Those translators are not in an employment relationship with the ministry. They also pursue other professions, such as doctor or lawyer, which by nature are unconnected with the status of an official. That is also the reason why they work at the place and time convenient to them and are remunerated in accordance with the quantity of work produced.

24 After translation the texts are returned to the Ministry of Foreign Affairs for collection by the individuals concerned. Finally, the fees received in respect of the translations are shared by that ministry between the translators in accordance with the services provided by each of them. On receipt of those amounts each translator issues a receipt on which he indicates the remuneration and the corresponding VAT. The translators account for that amount of VAT to the tax authorities after deduction of the VAT charged to them on the acquisition of goods or services.

25 The Greek Government proposes the following reply to the first question: the amount, determined according to the method of internal deduction, which a person providing services on an independent basis, albeit under the supervision of the State, enters on the invoice or on the receipt for the provision of services and which he receives constitutes VAT within the meaning of the Sixth Directive, where the individual recipient of the service and final consumer has paid to the State an amount of VAT which is included in the whole of that remuneration in a single amount.

26 Mrs Karageorgou claims that the tax in question does not display the essential characteristics of VAT inasmuch as it corresponds to a part of the remuneration of translators which was not charged to third parties or received from them. Owing to that fact, the tax in question could not be deemed to constitute VAT on the sole ground that it is mentioned as such in the receipts issued by the translators in respect of their provision of services.

27 In identical observations Mrs Petrova and Mr Vlachos state that, on submission to the Ministry of Foreign Affairs of documents to be translated, individuals requesting an official translation pay the appropriate fee as indicated by the competent official which is not subject to VAT. When the Greek State authenticates those translations by affixing its official seal to them, it acts pursuant to public powers and cannot therefore impose VAT on that operation. The translators are then paid by the ministry on the basis of translations produced and of the price per page as determined by Ministerial decree. They are requested by the ministry to transmit to it a global receipt in respect of the services provided. That receipt is mandatorily established by the accounts department of the ministry and includes an amount in respect of VAT which is deducted from their statutory remuneration as determined by the ministerial decree in question per page of translation.

28 The Ministry of Foreign Affairs does not and could not legally charge VAT to individuals with whom it alone has entered into relations. Consequently, in the present case it is not a tax of a VAT nature since it is not and could not be passed on to the final consumer.

29 The Commission of the European Communities recalls that Article 2(1) of the Sixth Directive provides that supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such are subject to VAT. Consequently, a transaction carried out (even for consideration) by a non-taxable person is not subject to VAT.

30 In the present case, the national courts have already held not only that the translators are not taxable persons in regard to translations intended for the Ministry of Foreign Affairs but that there is not even any transaction, in particular for consideration, since the relationship that exists as between the translators and the State is that of employer and employee in regard to their pay and working conditions and the employer's liability, with the result that they may be regarded as forming an integral part of the personnel of the State. It follows that the case cited in the first question does not come within the scope of the Community legislation in force in matters concerning VAT.

31 The amount entered in error on an invoice does not therefore have the character of VAT for the purposes of the Sixth Directive, whether or not the State erroneously deemed it to be VAT. Nor for the same reason does Article 21(1)(c) of that directive apply in the present case. That amount could be reimbursed to the person concerned simply as an amount unduly paid.

Findings of the Court

32 It is apparent from the orders for reference, and has been confirmed by the parties' observations, that the translators' remuneration is deemed to include an amount equal to the VAT payable with the result that the amount actually paid to them is constituted by their statutory remuneration less the amount representing the VAT.

33 In order to determine whether the amount thus deducted must be deemed to be VAT, it must be determined whether the translators are subject to the provisions concerning VAT in respect of the services provided by them to the Ministry of Foreign Affairs.

34 It is clear from Article 2(1)(c) of the Sixth Directive that supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such are subject to value added tax.

35 Article 4 of the Sixth Directive defines 'taxable person' for the purposes of the directive. Article 4(1) thereof defines 'taxable person' as any person who 'independently' carries out an economic activity. Article 4(4) thereof states that the word 'independently' excludes from the tax not only employed persons but also persons 'bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.'

36 In accordance with the orders for reference the court before which the matter came at first instance in the main proceedings held that the translators carry on their activity under a relationship of employer and employee with the Ministry of Foreign Affairs as regards working conditions and pay. On that point the judgments at first instance were confirmed on appeal and the appellate judgments were not annulled when they were brought before the Simvoulio tis Epikratias. In the national court's view it follows that the facts in that connection are established.

37 In its written observations the Greek Government classified the translators as independent and maintained that the nature of their links with the Ministry of Foreign Affairs is still the subject of varying assessments by different Greek courts. None the less, that government stated in its oral observations that it was not seeking to challenge the case-law mentioned in the preceding paragraph in accordance with which the translators carry on their activity within the context of an employer-employee relationship.

38 In that connection it should be noted that under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, when ruling on the interpretation or validity of Community provisions, the Court is empowered to do so only on the basis of the facts which the national court puts before it (see Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 31, and judgments cited).

39 The Court cannot express a view on the nature of the relationship between the translators and the Ministry of Foreign Affairs. In replying to the questions referred it must rely on the assessment made by the national court pursuant to which the translators perform their activity on the basis of an employer-employee relationship.

40 On that premiss, in the present case the translators are not 'independently' carrying on an economic activity as defined in Article 4(4) of the Sixth Directive and are not therefore 'taxable persons' within the meaning of Article 4(1) thereof. Accordingly, under Article 2(1) thereof the services which they provide to the Ministry of Foreign Affairs are not subject to VAT.

41 It follows that if such translators mention in error an amount by way of VAT on the invoices which they draw up in relation to such services that amount cannot be described as VAT.

42 The reply to the first question must therefore be that the amount mentioned as VAT on the invoice drawn up by a person providing services to the State may not be classified as VAT where that person erroneously believes that he is providing those services as a self-employed person whilst in reality there is an employer-employee relationship.

Second question

Observations submitted to the Court

43 The Greek Government claims that the provisions of the Sixth Directive, in particular Article 21(1)(c) thereof, give expression to the principle of formalism of VAT. Where a receipt is issued in respect of the provision of services and the person issuing it mentions on it an amount of VAT which moreover he has received, there is an obligation to pay that amount to the State and reimbursement of that amount on the ground that it was unduly paid is subsequently precluded. That principle essentially seeks to prevent tax fraud which could arise where the amount of VAT mentioned on the invoice or other such document is subject to the deduction mechanism. Even where that amount of tax does not come within the scope of the VAT system and is not subject to the deduction procedure, the principle of the formalism of the tax requires that the VAT mentioned on the receipt be paid to the State because, if it were not, the person issuing the receipt would be unjustly enriched to the detriment of consumers who have paid the VAT in respect of services provided.

44 Consequently, the Greek Government proposes that the reply to the second question should be as follows: there can be no departure from the formal principle governing the tax as set out in Article 21(1)(c) of the Sixth Directive, where the State, in performing that activity, acts as intermediary and not as a taxable person where the tax is passed on to the end consumer, namely the recipient of translation services and where the provider of those services pays to the tax authority the amount of VAT received after deduction of any input tax, pursuant to the deduction procedure.

45 Mrs Karageorgou claims that Article 21(1)(c) of the Sixth Directive does not preclude the correction of the VAT mentioned in error on an invoice or other such document, particularly where it is not necessary to preclude the possibility of making a correction or requesting reimbursement of the VAT mentioned in error in order to prevent tax fraud or evasion.

46 Mrs Petrova and Mr Vlachos consider that the principle of formalism of the tax cannot apply in the present case because in this case it is not VAT. That principle must be left out of account in cases where it could not apply and where the tax has not been passed on and the trader consequently has not been enriched.

47 The Commission notes that the Sixth Directive makes no provision concerning adjustment in respect of an amount of VAT mentioned in error on an invoice by the person issuing it. Consequently, it is in principle for the Member State to determine the conditions in which an amount of VAT erroneously mentioned on an invoice may be adjusted.

Findings of the Court

48 By its second question the national court is essentially asking whether Article 21(1)(c) of the Sixth Directive, under which VAT is payable to the State if it is mentioned on an invoice or other document serving as invoice, precludes reimbursement of an amount mentioned in error by way of VAT on an invoice where the State is not acting as a taxable person within the meaning of Article 4(5) of that directive and that tax is not passed on to the final consumer.

49 The Sixth Directive does not make express provision for the case where the VAT is mentioned in error on an invoice where it is not due. Accordingly, so long as this lacuna has not been filled by the Community legislature, it is for the Member States to provide a solution in that regard (Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraphs 48 and 49).

50 In that connection the Court has held that, in order to ensure VAT neutrality, it is for the Member States to provide in their internal legal systems for the possibility of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith (Case C-342/87 *Genius Holding* [1989] ECR 4227, paragraph 18). However, where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss of tax revenues, VAT which has been improperly invoiced can be adjusted without such adjustment being made conditional upon the issuer of the relevant invoice having acted in good faith (*Schmeink & Cofreth and Strobel*, cited above, paragraphs 60 and 63).

51 As is clear from paragraphs 40 and 41 hereof, the services at issue in the main proceedings are not subject to VAT and the amount mentioned in error by way of VAT on the invoices relating to those services cannot therefore be classified as VAT.

52 In the event of adjustment of the amount thus mentioned, which can in no event constitute VAT, there is no risk of a loss of tax revenue in the context of the VAT regime. Consequently, in accordance with the case-law cited at paragraph 50 hereof, it is not necessary to show that the issuer of the invoice acted in good faith in order that the amount unduly invoiced may be adjusted.

53 It follows that the reply to the second question must be that Article 21(1)(c) of the Sixth Directive does not preclude reimbursement of an amount mentioned in error by way of VAT on an invoice or other document serving as invoice where the services at issue are not subject to VAT and the amount invoiced cannot therefore be classified as VAT.

Costs

54 The costs incurred by the Commission, which 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 (Sixth Chamber),

in answer to the questions submitted to it by the Diikitiko Efetio Athinon, by orders of 31 January 2002, hereby rules:

1. **The amount mentioned as value added tax on the invoice drawn up by a person providing services to the State may not be classified as value added tax**

where that person erroneously believes that he is providing those services as a self-employed person whilst in reality there is an employer-employee relationship.

2. Article 21(1)(c) 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 does not preclude reimbursement of an amount mentioned in error by way of value added tax on an invoice or other document serving as invoice where the services at issue are not subject to value added tax and the amount invoiced cannot therefore be classified as value added tax.

Puissochet Schintgen Skouris

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass V. Skouris

Registrar President