JUDGMENT OF THE COURT (Third Chamber)

19 February 2009 *

In Case C-1/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione (Italy), made by decision of 20 September 2007, received at the Court on 2 January 2008, in the proceedings

Athesia Druck Srl

v

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate,

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-N. Cunha Rodrigues, J. Klučka, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 November 2008,

after considering the observations submitted on behalf of:

— Athesia Druck Srl, by B. Migliucci and T. Kofler, avvocati,

— the Italian Government, by R. Adam, acting as Agent, and S. Fiorentino, avvocato dello Stato,

— the Commission of the European Communities, by A. Aresu and M. Afonso, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns 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), as amended by Tenth Council Directive 84/386/EEC of 31 July 1984 (OJ 1984 L 208, p. 58) ('the Sixth Directive').

2 The reference was made in proceedings between Athesia Druck Srl ('Athesia Druck') on the one hand and the Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance) and the Agenzia delle Entrate (Revenue Authority) on the other, concerning an additional assessment to value added tax ('VAT') which was issued to that company in respect of 1993 and 1994.

Legal context

Community legislation

3 The sixth recital in the preamble to the Sixth Directive is worded as follows:

'… 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 … the supply of services;... 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 6(4) of the Sixth Directive provides that, where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he is to be considered to have received and supplied those services himself.

5 Article 9 of that directive provides as follows:

'1. 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.

2. 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:

…

— advertising services,

…

3. In order to avoid double taxation, non-taxation or the distortion of competition the Member States may, with regard to the supply of services referred to in 2(e) … consider:

(a) the place of supply of services, which under this Article would be situated within the territory of the country, as being situated outside the Community where the effective use and enjoyment of the services take place outside the Community;

(b) the place of supply of services, which under this Article would be situated outside the Community, as being within the territory of the country where the effective use and enjoyment of the services take place within the territory of the country.

…'

6 Article 2 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) ('the Thirteenth Directive') states as follows:

'1. Without prejudice to Articles 3 and 4, each Member State shall refund to any taxable person not established in the territory of the Community, subject to the conditions set out below, any [VAT] charged in respect of services rendered … to him in

the territory of the country by other taxable persons … in so far as such … services are used for the purposes of … the provision of services referred to in point 1(b) of Article 1 of this Directive.

2. Member States may make the refunds referred to in paragraph 1 conditional upon the granting by third States of comparable advantages regarding turnover taxes.

3. Member States may require the appointment of a tax representative.'

National legislation

7 The Decree of the President of the Republic No 633 of 26 October 1972 establishing and regulating value added tax (ordinary supplement to GURI No 292 of 11 November 1972), in the version applicable at the material time ('the VAT Decree'), transposed the provisions of the Sixth Directive referred to above into Italian law.

8 Article 7 of the VAT Decree provides as follows:

'…

Supplies of services shall be deemed to be effected in Italy if they are provided by a person who has a permanent address there or who resides there and does not have a permanent address abroad or are provided by permanent establishments in Italy of persons who have a permanent address or reside abroad; they shall not be deemed to be effected in Italy if they are provided by permanent establishments abroad of persons who have a permanent address or reside in Italy. For the purposes of this article, in respect of persons other than natural persons, "permanent address" shall mean the place in which the registered office is situated and "residence" the place in which the real seat is situated.

By way of derogation from the rule laid down in the preceding subparagraph:

…

(d) … advertising services … and brokerage services relating to the abovementioned services and those relating to the obligation not to provide such services shall be deemed to be effected in Italy where they are supplied to persons having a permanent address in Italy or who reside there and do not have a permanent address abroad or are supplied to permanent establishments in Italy of persons who have a permanent address or reside abroad, unless they are used outside the European Economic Community;

(e) the services referred to at (d) which are supplied to persons who have a permanent address or reside in other Member States of the European Economic Community shall be deemed to be effected in Italy where the person to whom the services are

supplied is not liable to VAT in the State in which he has a permanent address or resides;

(f) the services referred to at (e), … supplied to persons who have a permanent address and reside outside the European Economic Community … shall be deemed to be effected in Italy if they are used there; if they are supplied by persons who have a permanent address or reside in Italy to persons who have a permanent address or reside outside the European Economic Community, such services shall be deemed to be effected in Italy if they are used there or in another Member State of the Community.'

9 Article 17 of the VAT Decree provides as follows:

'Persons supplying taxable goods or providing taxable services shall be liable to VAT; those persons shall pay the tax … to the tax authorities …

The rights and obligations arising from the application of this decree with regard to transactions carried out in Italy by or on behalf of persons not established in Italy and not having a fixed establishment there may be exercised or fulfilled in accordance with the usual conditions by a representative established in Italy …, who shall be jointly and severally liable with the person represented for the performance of the obligations arising from the application of this decree …

Where no representative is appointed in accordance with the preceding subparagraph, the obligations relating to … services provided in Italy by persons established abroad and the obligations relating to the provision of services referred to in Article 3(2) by persons established abroad to persons established in Italy must be fulfilled by the suppliers or the purchasers who … use the services in the operation of an undertaking or the exercise of a trade or profession. …

The provisions in the second and third subparagraphs are not applicable to transactions effected by or on behalf of the fixed establishments in Italy of persons residing abroad.'

10 Article 38b of the VAT Decree reiterates, in essence, the provisions of the Thirteenth Directive.

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

11 During 1993 and 1994, Athesia Advertising GmbH ('Athesia Advertising'), a company governed by Austrian law established in Innsbruck (Austria) and engaged in operating an advertising agency, purchased, in its own name and on behalf of Austrian and German clients, advertising space from Italian media (newspapers, magazines, radio and television). It operated from Austria and did not have a fixed establishment in Italy. However, Athesia Advertising had an Italian subsidiary, Athesia Druck, situated in Bressanone (Italy), which it appointed as its tax representative pursuant to Article 17 of the VAT Decree.

12 VAT was charged on the invoices in respect of the advertising services at issue in the main proceedings. The invoices were drawn up in the names of both Athesia Advertising and Athesia Druck. Where appropriate, Athesia Advertising then provided its own services to its clients. Since VAT was paid in Italy, Athesia Druck claimed reimbursement of the tax from the Italian tax authorities pursuant to the Thirteenth Directive.

13 In 1999, the Ufficio IVA di Bolzano (the Bolzano (Italy) VAT office) issued Athesia Druck with a notice of adjustment of VAT in respect of the returns made by that company for 1993 and 1994 in its capacity as the tax representative of Athesia Advertising on the basis, as is apparent from the order for reference, that it had omitted to charge VAT on invoices in respect of the advertising services provided to Athesia Advertising's Austrian and German clients. The question as to the place in which those services were supplied thus arose indirectly.

14 A fine was imposed along with the additional assessment to VAT.

15 Athesia Druck challenged the additional assessments in question before the Commissione tributaria di primo grado di Bolzano (Bolzano Tax Court of First Instance), which, by decisions of 11 April and 11 October 2000, rejected that company's claims in so far as they related to VAT but upheld them as regards the fine and Athesia Druck was accordingly relieved of any obligation to pay this.

16 On appeal, by decision of 17 December 2004, the Commissione Tributaria di secondo grado di Bolzano (Bolzano Tax Court of Second Instance) dismissed both Athesia Druck's appeals relating to the VAT for which it remained liable and the cross-appeals lodged by the Ufficio IVA di Bolzano.

17 Athesia Druck appealed against that decision to the Corte suprema di cassazione (Supreme Court of Cassation), the referring court.

18 The Corte suprema di cassazione decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'What — for VAT purposes, and in accordance with Article 9(2)(e) of the Sixth Directive … — is the place of supply in the case of advertising services supplied by a person established in a Member State of the European Community to a recipient which is established outside the Community but has a tax representative in the territory of a Member State? In particular, is it: (i) the place in which the recipient of the advertising material is established; (ii) the place in which the company which is the non-Community company's tax representative in Italy has its fixed establishment; (iii) the place in which the non-Community company seeking the advertising services has its fixed establishment; or (iv) the place in which the non-Community company's client is established?'

The question referred for a preliminary ruling

19 By its question, the Corte suprema di cassazione asks, in essence, how the place where advertising services are supplied, within the meaning of Article 9 of the Sixth Directive, is to be determined in a situation such as that in the main proceedings, in which the person supplying the services is established in a Member State, whereas the person to whom the services are supplied, while established in a non-Member country, has a tax representative in that Member State and is sometimes the final customer, that is, the advertiser, and sometimes an intermediate customer who himself provides services for his own clients, namely advertisers.

Preliminary observations

20 It should 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 (Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20; and Case C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet* [2008] ECR I-8255, paragraph 24).

21 Those specific instances include advertising services, which are referred to in the second indent of Article 9(2)(e) of the Sixth Directive.

The determination of the place where advertising services are deemed to be supplied under Article 9(2)(e) of the Sixth Directive

22 It is apparent from the wording itself of the second indent of Article 9(2)(e) of the Sixth Directive that the place where advertising 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 is 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.

23 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, and Case C-438/01 *Design Concept* [2003] ECR I-5617, paragraph 17).

24 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 (*Design Concept*, paragraph 18).

25 The Court has expressly stated that, under Article 9(1) and (2) of the Sixth Directive, 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, since Article 9 does not in any way require account to be taken of transactions carried out after that first supply of services (see, to that effect, *Design Concept*, paragraph 26).

26 Accordingly, 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, it is necessary to consider separately the transaction involving the supply of services by the first supplier to the intermediate customer, in order to determine the place of taxation of that transaction (see, to that effect, *Design Concept*, paragraph 28).

27 With regard to advertising services, therefore, where the recipient of the services is established outside the Community, the place of supply is, as a rule, according to Article 9(2)(e) of the Sixth Directive, defined as the place where that recipient has his principal place of business and it is unnecessary for account to be taken of the fact that that recipient is not necessarily the final advertiser.

The determination of the place where advertising services are deemed to be supplied under Article 9(3)(b) of the Sixth Directive

28 By way of derogation from the rule set out in the preceding paragraph, Article 9(3)(b) of the Sixth Directive permits a Member State, in order to avoid non-taxation in respect of the supply of services referred to in Article 9(2)(e) of that directive, to consider the place of supply of services, which under that article would be situated outside the Community, as being within the territory of the country if the effective use and enjoyment of the services take place within that territory.

29 The country within which the effective use and enjoyment of the services take place, within the meaning of Article 9(3)(b) of the Sixth Directive, is to be understood, with regard to advertising services, as referring to the country from which the advertising material is disseminated.

30 Irrespective of the fact that the recipients of those services may be located throughout the world, the Italian media undoubtedly operates primarily in Italy.

31 The effective use and enjoyment of the advertising material must therefore, in circumstances such as those in the main proceedings, be regarded as taking place in Italy.

32 It follows that, where the option available under that provision is exercised and a situation exists such as that in the main proceedings, the tax authorities of the Member State concerned would be justified, pursuant to Article 9(2) in conjunction with Article 9(3) of the Sixth Directive, in regarding the advertising services provided by the supplier to the customer, be that the final or intermediate customer, as supplied in the territory of that State and liable to VAT as such, but they would not be entitled to regard as being thus liable advertising services provided by an intermediate customer established outside the Community to his own clients.

33 Where services are supplied, according to the criteria laid down in Article 9(1) of the Sixth Directive, outside the Community (the principal place of business in a non-Member state and no fixed establishment in a Member State) and are not referred to in Article 9(2)(e), such a supply of services cannot benefit from the derogation provided for in Article 9(3)(b) of the Sixth Directive.

Whether the concept of a tax representative has any effect on the determination of the place where advertising services are deemed to be supplied

34 It should be pointed out that whether a tax representative is appointed, as referred to in particular in Article 2(3) of the Thirteenth Directive and Article 17 of the VAT Decree, does not, of itself, have any effect on whether the services received or provided by the represented person are liable to VAT, since the sole purpose of the system of representation is to enable the tax authorities to have an intermediary at national level where the taxable person is established abroad.

35 That is not the case, however, where the tax representative plays an economic role in the supply of services in question but, in such circumstances, it is on account of that role and not his capacity as tax representative that the transactions entered into by him are subject to tax.

36 It is, however, apparent from the documents before the Court and what was stated by the Italian Government at the hearing that, in the main proceedings, Athesia Druck did not play any economic role in the supply of services in question and cannot therefore be regarded as an intermediary for the purpose of Article 6(4) of the Sixth Directive.

Whether the determination of the place where the advertising services are deemed to be supplied has any effect on the right to the refund of VAT

37 It should be noted that the fact that the supply of services for the purpose of Article 9(3)(b) of the Sixth Directive is subject to VAT does not preclude the taxable person's right to the refund of VAT where he satisfies the conditions laid down in Article 2 of the Thirteenth Directive.

38 In the light of all the foregoing considerations, the answer to the question referred is as follows:

— with regard to advertising services, where the recipient of the services is established outside the Community, the place of supply is, as a rule, according to Article 9(2)(e) of the Sixth Directive, defined as the place where that recipient has his principal place of business. However, the Member States may exercise the option provided in

Article 9(3)(b) of the Sixth Directive and define the place where the services in question are supplied, by way of derogation from that rule, as within the Member State concerned;

— if the option available under Article 9(3)(b) of the Sixth Directive is exercised, advertising services provided by a supplier established in the Community to a customer situated in a non-Member state, whether that customer is the final customer or an intermediate customer, are deemed to be supplied within the Community, provided that the effective use and enjoyment of the services, within the meaning of Article 9(3)(b) of the Sixth Directive, take place within the Member State concerned. That is the case, with regard to advertising services, where the advertising material being supplied is disseminated from the Member State concerned;

— advertising services provided by a supplier established outside the Community for his own clients cannot be liable to VAT under Article 9(3)(b) of the Sixth Directive, even where that supplier acted in the capacity of intermediate customer in respect of an earlier supply of services, since such a supply of services does not fall within the scope of Article 9(2)(e) of that directive or, in more general terms, Article 9 of the directive as a whole, those being provisions which are expressly referred to in Article 9(3)(b) of that directive;

— the fact that the supply of services for the purpose of Article 9(3)(b) of the Sixth Directive is subject to VAT does not preclude the taxable person's right to the refund of VAT where he satisfies the conditions laid down in Article 2 of the Thirteenth Directive; and

— whether a tax representative is appointed does not, of itself, have any effect on whether the services received or provided by the represented person are liable to VAT.

Costs

39 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 (Third Chamber) hereby rules:

With regard to advertising services, where the recipient of the services is established outside the European Community, the place of supply is, as a rule, according to 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 Tenth Council Directive 84/386/EEC of 31 July 1984, defined as the place where that recipient has his principal place of business. However, Member States may exercise the option provided in Article 9(3)(b) of Sixth Direct-

ive 77/388, as amended, and define the place where the services in question are supplied, by way of derogation from that rule, as within the Member State concerned.

If the option available under Article 9(3)(b) of Sixth Directive 77/388, as amended, is exercised, advertising services provided by a supplier established in the European Community to a customer situated in a non-Member state, whether that customer is the final customer or an intermediate customer, are deemed to be supplied within the European Community, provided that the effective use and enjoyment of the services, within the meaning of Article 9(3)(b) of Sixth Directive 77/388, as amended, take place within the Member State concerned. That is the case, with regard to advertising services, where the advertising material being supplied is disseminated from the Member State concerned.

Advertising services provided by a supplier established outside the European Community for his own clients cannot be liable to VAT under Article 9(3)(b) of Sixth Directive 77/388, as amended, even where that supplier acted in the capacity of intermediate customer in respect of an earlier supply of services, since such a supply of services does not fall within the scope of Article 9(2)(e) of that directive or, in more general terms, Article 9 of the directive as a whole, those being provisions which are expressly referred to in Article 9(3)(b) of that directive.

The fact that the supply of services for the purpose of Article 9(3)(b) of Sixth Directive 77/388, as amended, is subject to value added tax does not preclude the taxable person's right to the refund of VAT where he satisfies the conditions laid down in Article 2 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.

Whether a tax representative is appointed does not, of itself, have any effect on whether the services received or provided by the represented person are liable to VAT.

[Signatures]