JUDGMENT OF THE COURT (Fifth Chamber)
26 October 1995 *

In Case C-144/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Commissione Tributaria Centrale for a preliminary ruling in the proceedings pending before that court between

Ufficio IVA di Trapani

and

Italittica SpA

on the interpretation of Article 10(2) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization 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 COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur), C. Gulmann, P. Jann and L. Sevón, Judges,

* Language of the case: Italian.

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Italian Government, by Professor Luigi Ferrari Bravo, Head of the Legal Department, Ministry of Foreign Affairs, acting as Agent, and Maurizio Fiorilli, Avvocato dello Stato,

— the French Government, by Catherine de Salins, Deputy Director in the Legal Directorate in the Ministry of Foreign Affairs, and Jean-Louis Falconi, Secretary for Foreign Affairs in the same Directorate, acting as Agents,

— the United Kingdom, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, and Vivien Rose, Barrister,

— the Commission of the European Communities, by Enrico Traversa, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the defendant, represented by F. Rocca, Dottore Commercialista; of the Italian Government; of the French Government; of the United Kingdom, represented by A. W. H. Charles, Barrister; and of the Commission, represented by E. de March, Legal Adviser, acting as Agent, at the hearing on 8 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 13 July 1995,

gives the following

Judgment

1 By order of 24 March 1994, received at the Court on 25 May 1994, the Commissione Tributaria Centrale (Central Tax Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 10(2) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization 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; hereinafter 'the Directive').

2 Those questions were raised in proceedings between the company Italittica and the Ufficio IVA di Trapani ('the Ufficio').

3 Italittica, which runs a fish-farming business, concluded two contracts with Sangiovanni Industrie Riunite ('Sangiovanni') for the construction of a building to be used in its business. Sangiovanni issued three invoices and on 17 October 1980 issued a *pro forma* invoice for the outstanding amount, LIT 338 215 680, without mentioning the VAT.

4 In the course of a tax inspection, it was found that Italittica had entered the building in its accounts for 1980 and had shown its debt to Sangiovanni under the heading 'outstanding invoices' without mentioning the VAT. The Ufficio considered that Italittica had infringed the fourth indent of Article 41 of the Decree of the President of the Republic No 633/72 of 26 October 1972 on the introduction and

regulation of VAT (GURI No 292 of 11 November 1972; hereinafter 'the DPR'), and consequently imposed a fine of LIT 94 700 000.

5 The fourth indent of Article 41 of the DPR, in the version in force at the relevant time, provides:

'A transferee or principal who, in the exercise of his activity, trade or profession, has acquired goods or services, without the issue of an invoice, or with the issue of an irregular invoice by the person having the obligation to draw up the invoice, must regularize the operation in the following manner:

(a) if he has not received the invoice within four months of the operation being effected, he must present within 30 days thereafter, at the competent office dealing with the matter, a document in duplicate in accordance with [the relevant requirements] and must at the same time pay the corresponding tax;

[...]'

6 Those are the circumstances in which Italittica appealed to the Commissione Tributaria di Primo Grado (Tax Court of First Instance), arguing, on the basis of the third indent of Article 6 of the DPR, that the tax was not chargeable because it had not yet paid the amount outstanding. That provision states: 'The supply of services is regarded as effected upon payment of the consideration.' According to Italittica, the *pro forma* document was not an invoice but simply a document issued as

evidence of the debt corresponding to the state of progress of the works and in order to obtain a grant from the regional authorities.

7 The Ufficio's appeal to the Commissione Tributaria di Secondo Grado (Tax Court of Second Instance) against the decision in favour of Italittica was dismissed.

8 In the course of the appeal lodged by the Ufficio against that dismissal, the Commissione Tributaria Centrale decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 10(2) of Council Directive 77/388/EEC allow the Member States to determine that the "receipt of the price" is to be regarded as the event which, for all supplies of services, renders the tax "chargeable"?

(2) Is a Member State which avails itself of the "derogation" provided for in Article 10(2) required to lay down "a specified period from the date of the chargeable event" within which the invoice or document serving as invoice must be issued even where "receipt of the price" has not yet occurred?

(3) Is a Member State which avails itself of the abovementioned "derogation" required to lay down detailed rules for documentation and recording of the completed service and the payment for it whenever the invoice or document serving as invoice has not been issued or "receipt of the price" has not occurred?'

The first question

9 Article 10(2) of the Directive provides: 'The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed.' The same paragraph lays down specific rules for deliveries of goods and supplies of services which give rise to successive statements of account or payments or where payment is made on account before the goods are delivered or the services are performed and provides in the third subparagraph:

'By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either:

— no later than the issue of the invoice or of the document serving as invoice, or

— no later than receipt of the price, or

— where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.'

10 It is in the context of that derogation that the third indent of Article 6 of the DPR provides that the services are to be regarded as performed upon payment of the consideration.

11 The national court entertains doubts as to whether the Italian legislation is compatible with the Directive. In substance, it considers that a derogation is possible only for 'certain transactions' (or certain types of services) or 'certain categories of taxable person'. Several provisions of the Directive show that in principle payment of the consideration is not the chargeable event or the moment when the tax becomes chargeable and Articles 2 and 4(1) and (2) of the Directive, which define 'taxable person', rule out the possibility that a taxable person may be regarded merely as a collector of tax previously paid to him by the recipient of the goods or service as a result of the latter having passed it on. On the contrary, the Directive deals with the passing on of tax in the provisions relating to the right of deduction. Finally, to regard the moment when payment is made as the date when VAT on all services becomes chargeable could lead suppliers and recipients of services to agree to make the moment when the tax becomes chargeable fall within the tax period which best suits them.

12 The Commission considers that Italy was not entitled to include all supplies of services in the derogation provided for in the third subparagraph of Article 10(2) of the Directive. Its argument is essentially based first on the wording of that provision, which must be interpreted strictly since it is a derogation from the rule that tax is chargeable when the goods are delivered or the services performed and secondly on Article 11(C) of the Directive.

13 That argument cannot be accepted.

14 Even if, as submitted by the Commission, the third subparagraph of Article 10(2) of the Directive should be interpreted strictly, it must be noted, as correctly pointed out by the French Government, that the set of transactions mentioned in

that provision comprises supplies of services and deliveries of goods. Within that set, supplies of services constitute a homogeneous sub-set. The phrase 'certain transactions', which involves no specific restriction, thus enables all services to be covered.

15 Article 6(4) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of a common system of value-added tax (OJ, English Special Edition 1967, p. 16) and the Commission's proposal for the Sixth Directive (Supplement 11/73 to the *Bulletin of the European Communities*, p. 13) provide for only rare exceptions to the rule that the tax is chargeable at the moment when the service is provided. As the Advocate General points out in point 22 of his Opinion, the fact that the Community legislature substantially extended the scope of the permitted derogations suggests that it intended to allow the Member States a wide margin of discretion. At the hearing, the French Government submitted that the Council had adopted the third subparagraph of Article 10(2) so that certain Member States, such as Italy and France, could retain their legislation which provided that the tax on services was chargeable on payment.

16 Article 11(C)(1) of the Directive, referred to by the national court and the Commission, does not dictate a different interpretation.

17 That provision, which states: 'In the case of ... total or partial non-payment ... after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States', is conceived with a

view to the application of the general rules but, as pointed out by the United Kingdom, may be applied by analogy in cases where the tax becomes chargeable on receipt of the price, in particular to enable adjustments to the amount of the tax to be made in order to take account of refunds or rebates granted after payment.

18 Article 22(3)(a) of the Directive, which requires taxable persons to issue an invoice or other document serving as invoice, is not incompatible with the tax becoming chargeable on receipt of the price. If it were, it would conflict with the provision in the third paragraph of Article 10(2) of which Italy has taken advantage, even if only in very specific cases.

19 For the same reason, the argument that where the tax is chargeable on receipt of the price the taxpayer becomes a mere collector of the tax, which would be contrary to the nature of the tax, cannot preclude a construction of the third subparagraph of Article 10(2) which permits the moment at which the tax is chargeable to be defined for all supplies of services as receipt of the price.

20 Finally, with regard to the possibility of fraud, it must be borne in mind that even the rule that the tax is chargeable at the moment when the services are performed enables suppliers and recipients of services to select that moment to serve their own interests. In any event, the supplier's interest in receiving payment of the service provided and the fact that, according to Article 17(1) of the Directive, the right to deduct the tax arises at the time when it becomes chargeable limits the cases in which payment is postponed in order to defer the moment the tax becomes chargeable.

21 The reply to the first question must accordingly be that the third subparagraph of Article 10(2) of the Directive allows the Member States to provide that receipt of the price is the event which, for all supplies of services, renders the tax chargeable.

The second question

22 Where a Member State opts for the derogation provided for in the first indent in the third subparagraph of Article 10(2) of the Directive, namely where it makes the tax chargeable no later than the issue of the invoice or the document serving as invoice, it may, in accordance with the third indent, provide that the tax becomes chargeable 'where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event'.

23 As the Commission has correctly submitted, that there is no such possibility where a Member State opts for the derogation laid down in the second indent is probably due to the fact that the Community legislature considered that a trader's interest in receiving consideration for the service carried out was a sufficient incentive to ensure prompt payment for the service.

24 The reply to the second question must accordingly be that a Member State which avails itself of the derogation provided for in the third subparagraph of Article 10(2) of the Directive is not required to lay down 'a specified period from the date of the chargeable event' within which the invoice or document serving as invoice must be issued even where the price has not yet been received.

The third question

25 Apart from the general obligation on the taxpayer set out in Article 22(2) of the Directive to keep accounts in sufficient detail to permit application of the tax and inspection by the tax authority, the Directive imposes no obligation on the Member States to require documents or records to be drawn up other than the 'invoice, or other document serving as invoice' provided for in Article 22(3)(a). In accordance with Article 22(8), it is for the Member States to impose such other obligations as they may deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

26 As the Advocate General observed in point 41 of his Opinion, the existence of such broad discretion is justified since Member States need to take into account the size of undertakings and their type of business activity and requirements laid down by company law or legislation on direct taxation.

27 In those circumstances, the Directive cannot be interpreted as requiring certain documents and records each time the invoice or other document serving as invoice has not been issued or the price has not been received.

28 The reply to the third question must accordingly be that the Member State which avails itself of the abovementioned derogation is not required to lay down detailed rules for documentation and recording of the completed service and the payment for it whenever the invoice or document serving as invoice has not been issued or the price has not been received.

Costs

29 The costs incurred by the Italian and French Governments, the United Kingdom and the Commission of the European Communities, 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 proceedings 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 questions referred to it by the Commissione Tributaria Centrale by order of 24 March 1994, hereby rules:

1. **The third subparagraph of Article 10(2) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment allows the Member States to provide that the receipt of the price is the event which, for all supplies of services, renders the tax chargeable.**

2. **A Member State which avails itself of the derogation provided for in the third subparagraph of Article 10(2) of Directive 77/388 is not required to lay down 'a specified period from the date of the chargeable event' within which the invoice or document serving as invoice must be issued even where the price has not yet been received.**

3. **The Member State which avails itself of the derogation in the third subparagraph of Article 10(2) of Directive 77/388 is not required to lay down detailed rules for documentation and recording of the completed service and the payment for it whenever the invoice or document serving as invoice has not been issued or the price has not been received.**

Edward Moitinho de Almeida Gulmann

Jann Sevón

Delivered in open court in Luxembourg on 26 October 1995.

R. Grass

Registrar

D. A. O. Edward

President of the Fifth Chamber