JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004 *

In Case C-152/02,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Terra Baubedarf-Handel GmbH

and

Finanzamt Osterholz-Scharmbeck,

on the interpretation of Articles 17 and 18 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: German.

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, C.W.A. Timmermans, A. Rosas, A. La Pergola and S. von Bahr (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: M. Múgica Arzamendi, Principal Administrator,

after considering the written observations submitted on behalf of:

— Terra Baubedarf-Handel GmbH by H.-G. Fajen and A.C. Stange, Rechtsanwälte,

— the German Government by W.-D. Plessing and M. Lumma, acting as Agents,

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

— the Commission of the European Communities by E. Traversa and K. Gross, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Terra Baubedarf-Handel GmbH and the Commission at the hearing on 18 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 16 October 2003,

gives the following

Judgment

1 By decision of 21 March 2002, received at the Court on 26 April 2002, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 17 and 18 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 proceedings between Terra Baubedarf-Handel GmbH ('Terra Baubedarf') and Finanzamt Osterholz-Scharmbeck ('the Finanzamt') regarding the latter's refusal to allow the deduction of value added tax ('VAT')

for 1999 paid by Terra Baubedarf in respect of services supplied to it in that year and for which the invoices were drawn up during December 1999, but were not received by it until January 2000.

Relevant provisions

Community legislation

3 The first sentence of the first subparagraph of Article 10(2) of the Sixth Directive provides:

'The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed.'

4 Article 17(1) and (2)(a) of the Sixth Directive state:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;'.

Article 18(1) and (2) of the Sixth Directive state:

'1. To exercise his right to deduct, the taxable person must:

(a) in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3);

...

2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

...'

6 Article 22(3) of the Sixth Directive provides:

'3. (a) Every taxable person shall issue an invoice, or other document serving as invoice in respect of all goods and services supplied by him to another taxable person or to a non-taxable legal person. ...

...

(b) The invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions.

...

(c) The Member States shall determine the criteria for considering whether a document serves as an invoice.'

National legislation

7 Paragraph 15(1)(1) of the Umsatzsteuergesetz 1999 (Law on turnover tax, BGBl. 1999, p. 1270; 'the UStG') provides:

'A business may deduct the following amounts of input tax:

1. the tax stated separately in invoices within the meaning of Paragraph 14 in respect of supplies or other services performed for his business by other businesses. Where the separately stated amount of tax is attributable to a payment preceding performance of such transactions, it is already deductible if the invoice has been presented and payment made.'

8 As set out in the fourth sentence of Section 192(2) of the Umsatzsteuer-Richtlinien 2000 (Turnover Tax Guidelines 2000, in the version published on 10 December 1999, BStBl. I, Special Edition 2/1999; the 'UStR'):

'... where receipt of the services or supplies and receipt of the invoice fall within different tax periods, deduction is permissible in respect of the tax period in which both conditions are satisfied for the first time.'

The main proceedings and the question submitted for a preliminary ruling

9 According to the order for reference, Terra Baubedarf, a German company trading in building supplies, obtained supplies of services in 1999. However, the invoices relating to those services, although drawn up in December 1999, were not received by it until January 2000.

10 The Finanzamt did not allow the deduction of the VAT paid by Terra Baubedarf for 1999 in respect of those services on the grounds that, under Paragraph 15(1)(1) of the UStG and the fourth sentence of Section 192(2) of the UStR, the right to deduct could only be exercised in the case in point in respect of the year 2000, the year in which the relevant invoice was received.

11 The objection and subsequent action brought before the Niedersächsisches Finanzgericht (Germany) by Terra Baubedarf were unsuccessful. That court confirmed the view of the Tax Office.

12 Terra Baubedarf then brought an appeal on a point of law ('Revision') against that decision before the Bundesfinanzhof, claiming that a time- limit had been placed on its right to deduct the input VAT paid, in breach of the Sixth Directive.

13 The Bundesfinanzhof observes that, according to the case-law of the Court, Terra Baubedarf's right to deduct arose in 1999 in accordance with Article 17 of the Sixth Directive, and that, in accordance with Article 18 of the Sixth Directive, that right could not be exercised until 2000, after receipt of the invoice (see, inter alia, Case C-85/95 *Reisdorf* [1996] ECR I-6257, paragraph 22).

14 The national court is uncertain, however, whether that right to deduct may or must be claimed and produce its effect as from the 1999 tax year. Article 18(1)(a) of the Sixth Directive could be interpreted as meaning that it merely lays down the conditions governing the exercise of the right to deduct, but is silent as to the tax years in respect of which the deduction must or may be claimed.

15 Accordingly, the Bundesfinanzhof decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Can a taxable person exercise his right to deduct input tax only in respect of the calendar year in which he holds an invoice pursuant to Article 18(1)(a) of Directive 77/388/EEC or must the right to deduct always be exercised (even if retrospectively) in respect of the calendar year in which the right to deduct pursuant to Article 17(1) of Directive 77/388/EEC arose?'

The question submitted for a preliminary ruling

16 By its question, the national court is essentially asking whether, for the deduction referred to in Article 17(2)(a) of the Sixth Directive, the first subparagraph of Article 18(2) of the Sixth Directive must be interpreted as meaning that the right to deduct must be exercised in respect of the tax period in which the two conditions required by that provision are satisfied, namely that the right to deduct has arisen and that the taxable person holds an invoice drawn up in accordance with Article 22(3) of the Sixth Directive.

Observations submitted to the Court

17 Terra Baubedarf claims that the right to deduct input tax paid pursuant to Article 18(1) of the Sixth Directive produces its effect in the tax year in which that right arose in accordance with Article 17(1) of that directive read in conjunction with Article 10(2) of the same directive.

18 That interpretation is confirmed by Article 18(2) of the Sixth Directive, a provision on operation of the taxation which refers solely to the origin of the right to deduct. Its exercise is then set at the 'same period'.

19 That immediate deduction, giving rise to the tax and the right to deduct at the same time, reflects the principle of neutrality. Technically, when the invoice is received after a tax period, immediate deduction can be guaranteed only through retroactive exercise of the right to deduct.

20 Furthermore, measures subjecting the exercise of the right to deduct to additional conditions to guarantee collection of the VAT, namely possession of an invoice (see Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517), comply with the principle of proportionality only if they are coupled with retroactive effect.

21 The German Government and the Commission of the European Communities note that the German version of the first subparagraph of Article 18(2) of the Sixth Directive reads as follows:

'Der Vorsteuerabzug wird vom Steuerpflichtigen global vorgenommen, indem er von dem Steuerbetrag, den er für einen Erklärungszeitraum schuldet, den Betrag der Steuer absetzt, für die das Abzugsrecht entstanden ist und wird nach Absatz 1 während des gleichen Zeitraums ausgeübt.'

22 They submit that, with regard to the rules governing the exercise of the right to deduct, that version does not establish clearly whether the period in respect of which the right to deduct may be claimed means the period in which the right to

deduct arose or that in which the conditions referred to in the first paragraph of that article are satisfied in addition to the right to deduct. Other language versions enable that provision to be understood without ambiguity, however.

23 The German Government takes the view that a comparative literal interpretation of the French and English versions of the first subparagraph of Article 18(2) of the Sixth Directive, in particular, suffices to show that the taxable person may exercise the right to deduct only in respect of the tax period in which he also holds the invoice required by Article 18(1)(a). In this connection, it cites the wording of the French and English versions of the first subparagraph of Article 18(2):

'La déduction est opérée globalement par l'assujetti par imputation, sur le montant de la taxe due pour une période de déclaration, du montant de la taxe pour laquelle le droit à déduction a pris naissance et est exercé en vertu du paragraphe 1, au cours de la même période.' (French version)

'The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.' (English version)

24 In addition, a retroactive right to deduct would result in significant additional work for both taxable persons and the tax authorities. Through the retroactive deduction of input VAT, provisional returns filed for a tax period would in fact have to be adjusted, in certain circumstances even several times in the same tax period, and the tax authorities would have to draw up correction notices.

25 By contrast, the interpretation upheld by the German Government guarantees a VAT system that can be applied and checked effectively as regards the deduction of input VAT.

26 The Commission cites the Italian and Dutch versions besides the French and English versions. It appears from those that the period concerned is determined by the concurrent existence of the origin of the right to deduct and possession of the invoice.

27 According to the Commission, that conclusion is objective. Article 18(1) of the Sixth Directive guarantees correct application of the VAT system. By making the period in respect of which the right to deduct may be claimed dependent on the simultaneous possession of the invoice, other claims to the right to deduct, which would have to be retroactive, are avoided.

28 The French Government remarks that the invoice fulfils the function of documenting the taxable person's rights and obligations with respect to VAT, while ensuring that VAT is collected and checked by the tax authority, in particular with regard to the right to deduct (see *Reisdorf*, cited above, paragraph 29, and Case C-141/96 *Langhorst* [1997] ECR I- 5073, paragraphs 17 and 21).

29 To accept systematically that the right to deduct relates to the tax year in respect of which the right to deduct arose regardless of the date on which the taxable person actually came into possession of the invoice would involve a significant risk for each Member State in the monitoring of entries appearing on VAT returns.

Reply of the Court

30 It must be noted first that Article 18 of the Sixth Directive relates to the conditions governing the exercise of the right to deduct, whilst the existence of such a right is covered by Article 17 of that directive (see Case C-338/98 *Commission* v *Netherlands* [2001] ECR I-8265, paragraph 71).

31 It follows from Article 17(1) of the Sixth Directive that the right to deduct arises at the time when the deductible tax becomes chargeable. In accordance with Article 10(2) of that directive, that is the case as soon as the goods are delivered or the services are performed (see Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 36).

32 On the other hand, it is apparent from Article 18(1)(a), read in conjunction with Article 22(3) of the Sixth Directive, that the exercise of the right to deduct referred to in Article 17(2)(a) of that directive is normally dependent on possession of the original of the invoice or of the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice (*Reisdorf*, cited above, paragraph 22).

33 As regards the tax period in respect of which that deduction may be made, as the German Government and the Commission have stated, the German version of the first subparagraph of Article 18(2) of the Sixth Directive does not establish clearly whether the period in respect of which the right to deduct may be claimed means the period in which the right to deduct arose or that in which the conditions of possession of the invoice and the right to deduct are satisfied.

34 However, although the German version of that provision is ambiguous on that point, it is apparent from the French and English versions of the Sixth Directive that the deduction referred to in Article 17(2) thereof must be made in respect of the tax period in which the two conditions required under the first subparagraph of Article 18(2) are satisfied. In other words, the goods must have been delivered or the services performed and the taxable person must be in possession of the invoice or the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice.

35 That interpretation is consistent with case-law holding that the right to deduct provided for in Article 17 et seq. of the Sixth Directive, which is an integral part of the VAT system and may not in principle be limited, must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia, Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 27, and Case C-409/99 *Metropol and Stadler* [2002] ECR I-81, paragraph 42). The exercise of that right assumes that, in principle, taxable persons do not make payment and therefore do not pay input VAT until they have received an invoice, or another document which may be considered to serve as an invoice, and that the VAT cannot be regarded as being chargeable on a given transaction before it has been paid.

36 That interpretation is also consistent with the principle of neutrality of VAT which, according to case-law, is maintained, since the system of deduction set out in Title XI of the Sixth Directive enables the intermediate links in the distribution chain to deduct from their own taxable amount the sums paid by each to his own supplier in respect of VAT on the corresponding transaction and thus pass on to the tax authorities the part of the VAT representing the difference between the price paid by each to his supplier and the price at which he supplied the goods to his purchaser (see Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraph 33, and Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315, paragraph 42).

37 As regards the principle of proportionality, it is not infringed by requiring the taxable person to effect the deduction of input VAT in respect of the tax period in which the condition of possession of the invoice or of a document considered to serve as an invoice and that of the origin of the right to deduct are satisfied. First, that requirement is consistent with one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected, under the supervision of the tax authorities (see *Reisdorf*, paragraph 24, and *Langhorst*, paragraph 17, cited above), and secondly, as stated in paragraph 35 of this judgment, payment for delivery of goods or performance of services, and therefore payment of input VAT, is not normally made until the invoice has been received.

38 The answer to the national court's question must therefore be that for the deduction referred to in Article 17(2)(a) of the Sixth Directive the first subparagraph of Article 18(2) of the Sixth Directive must be interpreted as meaning that the right to deduct must be exercised in respect of the tax period in which the two conditions required by that provision are satisfied, namely that the goods have been delivered or the services performed and that the taxable person holds the invoice or the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice.

Costs

39 The costs incurred by the German 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 Bundesfinanzhof by order of 21 March 2002, hereby rules:

For the deduction referred to in Article 17(2)(a) 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, the first subparagraph of Article 18(2) of the Sixth Directive must be interpreted as meaning that the right to deduct must be exercised in respect of the tax period in which the two conditions required by that provision are satisfied, namely that the goods have been delivered or the services performed and that the taxable person holds the invoice or the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice.

Jann Timmermans Rosas

La Pergola von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President