JUDGMENT OF THE COURT (Third Chamber)

18 June 2009 *

In Case C-566/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Hoge Raad der Nederlanden (Netherlands), made by decision of 30 November 2007, received at the Court on 21 December 2007, in the proceedings

Staatssecretaris van Financiën

v

Stadeco BV,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, A. Ó Caoimh, U. Lõhmus, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2008,

after considering the observations submitted on behalf of:

— Stadeco BV, by A. Fruijtier, advocaat,

— the Netherlands Government, by C. Wissels, M. de Grave and C. ten Dam, acting as Agents,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the Greek Government, by S. Spyropoulos, S. Trekli and M. Tassopoulou, acting as Agents,

— the Italian Government, by R. Adam, acting as Agent, assisted by G. De Bellis, avvocato dello Stato,

— the Commission of the European Communities, by D. Triantafyllou and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1)('the Sixth Directive'), and the principle of fiscal neutrality.

2 The reference for a preliminary ruling was made in the course of proceedings between the Staatssecretaris van Financiën (the 'Staatssecretaris') and Stadeco BV ('Stadeco') concerning the right of a taxable person to a refund of the value added tax ('VAT') mentioned on the invoice sent to the beneficiary of the services supplied.

Legal context

Community legislation

3 Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to VAT.

4 Article 9(2)(c) of that directive specifies that 'the place of the supply of services relating to … cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organisers of such activities, and where appropriate, the supply of ancillary services … shall be the place where those services are physically carried out'.

5 Article 21(1)(c) of that directive provides that under the internal system, 'any person who mentions the [VAT] on an invoice or other document serving as invoice', is to be liable to pay VAT.

National legislation

6 Under Article 1(1)(a) of the law on turnover tax (Wet op de Omzetbelasting) of 28 June 1968 (*Staatsblad* 1968, No 329), in the version applicable to the tax year at issue in the main proceedings (the 'Wet'), provides that 'a tax called "turnover tax" shall be levied on … the supply of goods or services effected in the Netherlands by traders in the course of their business'.

7 Article 6(2)(c)(1) of the Wet specifies that 'the place of the supply of services relating to … cultural, artistic, sporting, scientific, educational and entertainment or similar activities … is the place where those services are actually carried out'.

8 Article 12(1) of the Wet states that 'the tax is collected by the trader who makes the supply or who provides the service'.

9 Article 14(1) of the Wet stipulates that the 'tax which becomes chargeable in a given tax period must be paid on the basis of a declaration'.

10 Article 37 of the Wet provides that '[a]nyone who makes any form of tax return in respect of turnover tax for which, under any provision other than the present article, he was not liable shall become liable for that tax upon issuing the invoice; he must pay it in accordance with Article 14'.

11 According to the order for reference, at the material time and as the Netherlands Government has stated, in accordance with the instruction of the Staatssecretaris, for the purposes of the refund of turnover tax, the Netherlands tax authorities required the issuer of an invoice incorrectly mentioning such a tax to correct the invoice, either by issuing a new invoice or by issuing a credit note addressed to the beneficiary of the services provided.

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

12 Stadeco is a company established in the Netherlands which is in the business of renting, constructing and dismantling stands for trade fairs and exhibitions.

13 In the years 1993 to 1995, Stadeco provided its services in Germany and in third countries for the Economische Voorlichtingsdienst (Economic Affairs Press and Information Service; the 'EVD'), a body governed by public law established in the Netherlands and attached to the Ministry of Economic Affairs. The EVD used the services of Stadeco solely for activities not subject to turnover tax in the Netherlands and is not, as part of a body governed by public law, entitled to deduct that tax.

14 The invoices for those services provided outside the Netherlands included amounts due by way of turnover tax which would have been applicable to identical services provided in the Netherlands. The EVD paid those invoices in their entirety and Stadeco paid in the Netherlands the tax so included.

15 In 1996, the tax authorities informed Stadeco that it was not liable to any turnover tax in the Netherlands with regard to the services in question provided outside the Netherlands. Subsequently, Stadeco requested reimbursements of all the taxes paid on that basis, the amount of which was NLG 230 314 (EUR 104 512). As the tax authorities made the reimbursement requested subject to the correction of the invoices, Stadeco sent them a copy of a credit note to that effect. As a result, it received that reimbursement.

16 However, during an inspection in 2000, the tax authorities established that Stadeco had not issued any credit notes to EVD, nor corrected the invoices, nor had it made any repayment to it. For this reason, the tax authorities issued a supplementary tax notice for the entirety of the reimbursed taxes.

17 Following the dismissal of its complaint lodged against that notice, Stadeco obtained the annulment of that notice before the Gerechtshof te's-Gravenhage (Regional Court of Appeal, The Hague). That court held that the correction of the invoicing errors was not essential in the circumstances, because there was no risk of loss of tax revenue on account of the fact that the status of EVD excludes any right to deduct turnover tax.

18 The Staatsecretaris appealed in cassation to the Hoge Raad der Nederlanden against the judgment of the Gerechtshof te's-Gravenhage. He argues that, since Stadeco did not respect the requirements relating to the correction of the invoice, it does not have any right to retain the reimbursement of the turnover tax.

19 The referring court is of the view that, under the substantive rules on VAT, since the place of the supply of the services in question is not the Netherlands, the supplementary tax notice can only be based on Article 37 of the Wet, which transposes Article 21(1)(c) of the Sixth Directive into Netherlands law.

20 However, the referring court expresses doubts as to whether a turnover tax debt arises, under Article 21(1)(c) of the Sixth Directive, in the Member States where the issuer of an invoice is established, when the place of supply relating to that invoice is deemed to be, according to the common system of VAT, in another Member State.

21 If it does not, it also raises the question whether the refund of the tax debt can be made subject to the correction of the invoice in question, in particular when the beneficiary of the services supplied does not have the right to deduct tax. In that respect, it maintains that it cannot be ruled out from the outset that the Member States have the right to prescribe such requirements to prevent unjust enrichment.

22 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 21(1)(c) of the Sixth Directive … to be interpreted as meaning that no liability to pay VAT arises in the Member State in which the issuer of the invoice is resident or established if the issuer of that invoice includes on it the VAT in respect of an activity which, according to the common system of [VAT] is deemed to be carried out in another Member State or in a non-member country?

2. If not: if an invoice as referred to in Article 21(1)(c) of the Sixth Directive has been issued to an addressee who is not entitled to deduct VAT (and consequently there is no risk of any loss of tax revenue), are the Member States entitled to make the refund of the erroneously invoiced VAT which, according to that provision, is consequently liable to be paid, subject to the requirement that the taxable person subsequently issues a corrected invoice to his customer in which there is no mention of any VAT amount?'

The questions referred for preliminary ruling

The first question

23 By its first question, the referring court asks, essentially, whether Article 21(1)(c) of the Sixth Directive must be interpreted as meaning that no liability to pay VAT arises under that provision in the Member State in which the issuer of the invoice is resident or established, if the issuer of that invoice includes on it the VAT in respect of an activity which, according to the Sixth Directive, is deemed to be carried out in another Member State or in a non-member country.

24 In that connection, it must straight away be pointed out that, contrary to the assertion of Stadeco, the fact that Article 21(1)(c) of the Sixth Directive seeks to determine who is liable to pay VAT 'under the internal system', whereas in the main proceedings Stadeco did not provide the services in question to the EVD in the Netherlands, does not prevent subparagraph (c) of that provision from being applicable to the facts in the main proceedings.

25 First, as the Advocate General points out in point 12 of her Opinion, it follows in particular from Article 7(1) and Article 21(2) of the Sixth Directive that the expression 'under the internal system' refers to all of the territory of the European Community, as laid down in Article 3 of the Sixth Directive.

26 Second, it should be noted that under Article 21(1)(c) of the Sixth Directive, any person who mentions VAT on an invoice or other document serving as invoice is liable to pay that tax. In particular, those persons are liable to pay VAT mentioned on an invoice independently of any obligation to pay it on account of its being a transaction subject to VAT (see, to that effect, Case C-342/87 *Genius Holding* [1989] ECR 4227, paragraph 19; Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraph 53; and Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 23).

27 Consequently, in contrast to the case of tax debt which may arise on the basis of a transaction subject to VAT, the place of the supply of services giving rise to an invoice is not relevant with regard to the question whether a tax debt arises under Article 21(1)(c) of the Sixth Directive, which is due solely because the VAT is mentioned on that invoice.

28 In stating that the VAT mentioned on an invoice is due regardless of any obligation to pay on the basis of a transaction subject to VAT, Article 21(1)(c) of the Sixth Directive

seeks to eliminate the risk of loss of tax revenue which the right to deduct provided for in Article 17 of the Sixth Directive might entail (see, to that effect, *Schmeink & Cofreth and Strobel,* paragraphs 57 and 61; C-78/02 toC-80/02 *Karageorgou and Others* [2003] ECR I-13295, paragraphs 50 and 53; and *Reemtsma Cigarettenfabriken*, paragraph 23).

29 Even if the exercise of that right to deduct is limited only to taxes corresponding to a transaction subject to VAT (see *Genius*, paragraph 13), the risk of loss of tax revenue is not in principle completely eliminated as long as the addressee of an invoice incorrectly mentioning VAT could still use it for the purposes of such deduction under Article 18(1)(a) of the Sixth Directive (see, to that effect, *Schmeink & Cofreth and Strobel*, paragraph 57).

30 According to that provision, when a taxable person holds an invoice drawn up in accordance with Article 22(3) of that directive, he can rely on his right to deduct VAT before the tax authorities. As pointed out by the Netherlands and German Governments, it is conceivable that complex circumstances and legal relations could prevent the tax authorities from determining in sufficient time that other considerations preclude the exercise of the right to deduct.

31 Since the risk of the loss of tax revenue which the exercise of the right to deduct by the addressee of the invoice entails is carried by the Member State to which the VAT mentioned on the invoice relates, the VAT is due, pursuant to Article 21(1)(c) of the Sixth Directive, in that Member State.

32 In that connection, it is for the national court to ascertain, taking into account all the relevant circumstances of the case, to which Member State the VAT mentioned on the invoice in question is due. In particular, the rate mentioned, the currency in which the

amount to be paid is expressed, the language in which the invoice was drawn up, the content and context of the invoice in question, the place of establishment of the issuer of that invoice and the beneficiary of the services performed, as well as their behaviour, can be relevant in that regard.

33 In the light of the foregoing, the answer to the first question is that Article 21(1)(c) of the Sixth Directive must be interpreted as meaning that the VAT is due, pursuant to that provision, to the Member State to which the VAT mentioned on the invoice or other document serving as invoice relates, even if the transaction in question was not taxable in that Member State. It is for the national court to ascertain, taking into account all the relevant circumstances of the case, to which Member State the VAT mentioned on the invoice in question is due. In particular, the rate mentioned, the currency in which the amount to be paid is expressed, the language in which the invoice was drawn up, the content and context of the invoice in question, the place of establishment of the issuer of that invoice and the beneficiary of the services performed, as well as their behaviour, can be relevant in that regard.

The second question

34 By its second question, the referring court asks, essentially, whether the principle of fiscal neutrality precludes a Member State from making the refund of VAT, due in that Member State merely because it was erroneously mentioned on the invoice, subject to the requirement that the taxable person have sent the beneficiary of the services supplied a corrected invoice not mentioning that VAT, where the latter does not have any right to deduct VAT, and consequently there is no risk of loss of tax revenue.

35 In that regard, it should be borne in mind that the Sixth Directive does not make express provision for the case where the VAT is mentioned in error on an invoice when it is not due on the basis of a transaction subject to that tax. Accordingly, so long as this lacuna

has not been filled by the Community legislature, it is for the Member States to provide a solution (*Schmeink & Cofreth and Strobel,* paragraphs 48 and 49, and *Karageorgou and Others*, paragraph 49).

36 The Court has held that, to ensure VAT neutrality, it is for the Member States to provide for the possibility in their internal legal systems of refunding any tax improperly invoiced, once the person who issued the invoice shows that he acted in good faith (*Genius Holding*, paragraph 18).

37 However, where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss in tax revenues, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be adjusted without such adjustment being made conditional by the Member States upon the issuer of the relevant invoice having acted in good faith (see *Schmeink & Cofreth and Strobel*, paragraph 58, and *Karageorgou and Others*, paragraph 50).

38 In addition, that refund cannot be dependent upon the discretion of the tax authorities (*Schmeink & Cofreth and Strobel*, paragraph 68).

39 It should be borne in mind, in that connection, that the measures that the Member States may adopt in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives. They may not therefore be used in such a way that they would have the effect of undermining VAT neutrality, which is a fundamental principle of the common system

of VAT established by the relevant Community legislation (see, by way of analogy, *Schmeink & Cofreth and Strobel,* paragraph 59 and the case-law cited).

40 Consequently, if reimbursement of the VAT becomes impossible or excessively difficult as a result of the conditions under which applications for reimbursement of tax may be made, those principles may require that the Member States provide for the instruments and the detailed procedural rules necessary to enable the taxable person to recover the unduly invoiced tax (see, to that effect and by way of analogy, *Reemtsma Cigarettenfabriken*, paragraph 41).

41 In the main proceedings, it is clear that the Netherlands tax authorities, according to the general instructions of the Staatssecretaris to that effect, made the refund of the VAT paid by Stadeco subject to Stadeco's correction of the invoices sent to EVD, either by the sending of new invoices not mentioning the VAT or by the drawing up of a credit note.

42 Since both a corrected invoice and a credit note clearly indicate to the beneficiary of the services supplied that no VAT is due to the Member State in question and, therefore that that beneficiary does not have any right in that regard to deduct VAT, that requirement can in principle ensure the elimination of the risk of loss of tax revenue. In addition, that requirement clearly does not make the reimbursement of that tax dependent on the discretion of the tax authority.

43 Furthermore, while it is for the national court to assess in the main proceedings whether Stadeco had demonstrated that it had itself completely eliminated in sufficient time the risk of the loss of tax revenue, the Court may, in order to give the national court a useful

answer, provide it with all the guidance that it deems necessary (see to that effect, in particular, Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 30, and Case C-414/07 *Magoora* [2008] ECR I-10921, paragraph 33).

44 According to the order for reference, Stadeco sent the Netherlands tax authorities a copy of a credit note made out to EDV whereas, in reality, Stadeco had neither drawn up such a note nor corrected the invoices in question in the main proceedings.

45 It appears that, in the main proceedings, the risk of loss of tax revenue was only eliminated because, on the one hand, the status of the EVD as a public-law body and, on the other, the fact that EVD used the services of Stadeco exclusively for activities not subject to turnover tax in the Netherlands excluded any right to deduct in respect of that tax.

46 However, as has been pointed out in paragraph 30 of this judgment, it cannot in a general manner be ruled out that complex circumstances and legal relations could stand in the way of a finding, in sufficient time, by the tax authorities that such considerations preclude the exercise of the right to deduct.

47 In such circumstances, it must be held that making the refund of the VAT mentioned on an invoice subject to the requirement that that invoice be corrected, does not in principle go beyond what is necessary to achieve the objective of completely eliminating all risk of loss of tax revenue.

48 In addition, in so far as it appears from the circumstances of the main proceedings that the Netherlands tax authorities have also made the refund of the VAT subject to the payment by the issuer of the invoice in question, to the beneficiary of the services performed, of the amount of tax incorrectly paid, it must be recalled that Community law does not prevent a national legal system from disallowing repayment of charges which have been levied but were not due, where to allow such repayment would lead to unjust enrichment of those having the right (Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 41 and the case-law cited).

49 The existence and the degree of unjust enrichment which repayment of a charge which was levied though not due under Community law entails for a taxable person can be established only following an analysis in which all the relevant circumstances are taken into account (see, to that effect, *Marks & Spencer*, paragraph 43).

50 It must be pointed out that it is for the national court to carry out such an analysis. In that context, it could be relevant whether the contracts concluded between Stadeco and EVD relate to fixed amounts of remuneration for the services provided or basic amounts increased, where appropriate, by the tax applicable. In the first case, there might be no unjust enrichment of Stadeco.

51 In view of all the foregoing, the answer to the second question is that the principle of fiscal neutrality does not generally preclude Member States from making the refund of VAT due in that Member State merely because it was erroneously mentioned on the invoice subject to the requirement that the taxable person have sent the beneficiary of

the services performed a corrected invoice not mentioning that VAT, if that taxable person has not completely eliminated in sufficient time the risk of the loss of tax revenue.

Costs

52 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:

1. **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, as amended by Council Directive 91/680/EEC of 16 December 1991 must be interpreted as meaning that turnover tax is due, in accordance with that provision, to the Member State to which the VAT mentioned on an invoice or other document serving as invoice relates, even if the transaction in question was not taxable in that Member State. It is for the national court to ascertain, taking into account all the relevant circumstances of the case, to which Member State the VAT mentioned on the invoice in question is due. In particular, the rate mentioned, the currency in which the amount to be paid is expressed, the language in which the invoice was drawn up, the content and context of the invoice at issue, the place of establishment of the issuer of that invoice and the beneficiary of the services performed, as well as their behaviour, can be relevant in that regard.**

2. The principle of fiscal neutrality does not generally preclude Member States from making the refund of VAT due in that Member State merely because it was erroneously mentioned on the invoice subject to the requirement that the taxable person have sent the beneficiary of the services performed a corrected invoice not mentioning that VAT, if the taxable person has not completely eliminated in sufficient time the risk of the loss of tax revenue.

[Signatures]