JUDGMENT OF THE COURT (Third Chamber)

15 July 2010 *

In Case C-582/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 December 2008,

European Commission, represented by R. Lyal and M. Afonso, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by I. Rao and S. Hathaway, acting as Agents, and K. Lasok QC,

defendant,

* Language of the case: English.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

Advocate General: N. Jääskinen,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 10 February 2010,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court for a declaration that, by denying recovery of input value added tax ('VAT') in respect of certain transactions carried out by taxable persons not established in the territory of the European Union, the United Kingdom of Great Britain and Northern Ireland has

failed to comply with its obligations under Articles 169 to 171 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive'), and with Article 2(1) of the Thirteenth VAT 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').

Legal background

European Union legislation

2 Article 17(3) and (4) 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 Council Directive 2004/66/EC of 26 April 2004 (OJ 2004 L 168, p. 35) ('the Sixth Directive'), in the version resulting from Article 28f(1) thereof, provides:

'3. Member States shall also grant every taxable person the right to the deduction or refund of the [VAT] referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

(a) transactions relating to the economic activities referred to in Article 4(2), carried out in another country, which would be deductible if they had been performed within the territory of the country;

(b) transactions which are exempt pursuant to Articles 14(1)(g) and (i), 15, 16 (1)(B), (C), (D) or (E) or (2) or 28c(A) and (C);

(c) any of the transactions exempt pursuant to Article 13(B)(a) and (d)(1) to (5), when the customer is established outside the Community or when those transactions are directly linked with goods to be exported to a country outside the Community.

4. The refund of [VAT] referred to in paragraph 3 shall be effected:

— to taxable persons who are not established within the territory of the country but who are established in another Member State in accordance with the detailed implementing rules laid down in Directive 79/1072/EEC,

— to taxable persons who are not established within the territory of the Community, in accordance with the detailed implementing rules laid down in Directive 86/560/EEC.

…'

3 Article 17(4) of the Sixth Directive provided, in its initial version:

'The Council shall endeavour to adopt before 31 December 1977, on a proposal from the Commission and acting unanimously, Community rules laying down the arrangements under which refunds are to be made in accordance with paragraph 3 to taxable persons not established in the territory of the country. Until such Community arrangements enter into force, Member States shall themselves determine the method by which the refund concerned shall be made. Where the taxable person is not resident in the territory of the Community, Member States may refuse the refund or impose supplementary conditions.'

4 Articles 169 to 171 of the VAT Directive replaced Article 17(3) and (4) of the Sixth Directive from 1 January 2007.

5 Article 169 of the VAT Directive provides:

'In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;

(b) transactions which are exempt pursuant to Articles 138, 142 or 144, Articles 146 to 149, Articles 151, 152, 153 or 156, Article 157(1)(b), Articles 158 to 161 or Article 164;

(c) transactions which are exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community.'

6 Article 170 of the VAT Directive provides:

'All taxable persons who, within the meaning of Article 1 of Directive 79/1072/EEC, Article 1 of Directive 86/560/EEC and Article 171 of this Directive, are not established in the Member State in which they purchase goods and services or import goods subject to VAT shall be entitled to obtain a refund of that VAT in so far as the goods and services are used for the purposes of the following:

(a) transactions referred to in Article 169;

(b) Transactions for which the tax is solely payable by the customer in accordance with Articles 194 to 197 or Article 199.'

7 Article 171 of the VAT Directive states:

‘1. VAT shall be refunded to taxable persons who are not established in the Member State in which they purchase goods and services or import goods subject to VAT but who are established in another Member State, in accordance with the detailed implementing rules laid down in Directive 79/1072/EEC.

…

2. VAT shall be refunded to taxable persons who are not established within the territory of the Community in accordance with the detailed implementing rules laid down in Directive 86/560/EEC.

…

3. Directives 79/1072/EEC and 86/560/EEC shall not apply to the supply of goods which is, or may be, exempted pursuant to Article 138 where the goods thus supplied are dispatched or transported by or on behalf of the person acquiring the goods.’

8 The exempt transactions referred to in Article 169(c) of the VAT Directive concern particularly, according to Article 135(1)(a) to (f), insurance and financial transactions such as those specified by the latter provision.

9 Article 2 of Eighth Council Directive 79/1072/EEC of 6 December 1979 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 the territory of the country (OJ 1979 L 331, p. 11) ('the Eighth Directive'), provides:

'Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any [VAT] charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC and of the provision of services referred to in Article 1(b).'

10 Article 8 of the Eighth Directive, which was repealed by Article 7 of the Thirteenth Directive, provided:

'In the case of taxable persons not established in the territory of the Community, Member States may refuse refunds or impose special conditions.

Refunds may not be granted on terms more favourable than those applied in respect of taxable persons established in the territory of the Community.'

11 The Explanatory Memorandum in the Proposal for the Eighth Council Directive (COM (77) 721 final of 3 January 1978, p. 3) ('Proposal for the Eighth Directive'), submitted by the Commission, states as regards Article 2 of that proposal:

'The reference in Article 17(4) of the Sixth Directive ("in accordance with paragraph 3") has the effect that the refund is to be made solely in respect of the tax charged on the purchases of goods and services or on the importation of goods used by the foreign taxable person for the activities specified in Article 17(3) of the Directive. Of the three cases referred to in subparagraphs (a), (b) and (c) of this paragraph, only the first two would seem to be relevant.

...

As for the cases covered by subparagraph (c) of Article 17(3) of the Directive, a person from a member country carrying out insurance or banking transactions referred to in that paragraph can never, since such transactions invariably occur in a third country, be regarded as carrying out a transaction in the country of refund: consequently, these cases rank with those referred to in subparagraph (a) (foreign taxable person not carrying out any taxable transaction in the country of refund) and are governed by the rules set out therein.'

12 Article 2 in the version of the Proposal for the Eighth Directive, which was approved by the European Parliament, referred to the refund of VAT in respect of goods and services 'in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3) of the Sixth Council Directive of 17 May 1977'.

13 The second recital in the preamble to the Thirteenth Directive states:

'Whereas there is a need to ensure the harmonious development of trade relations between the Community and third countries based on the provisions of Directive 79/1072/EEC, while taking account of the varying situations encountered in third countries.'

14 Article 2 of the Thirteenth Directive provides:

'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 or moveable property supplied to him in the territory or the country by other taxable persons or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC or 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.

...'

15 Article 4 of the Thirteenth Directive provides:

'1. For the purposes of this Directive, eligibility for refunds shall be determined in accordance with Article 17 of Directive 77/388/EEC as applied in the Member State where the refund is paid.

2. Member States may, however, provide for the exclusion of certain expenditure or make refunds subject to additional conditions.

3. This Directive shall not apply to supplies of goods which are or may be exempted under point 2 of Article 15 of Directive 77/388/EEC.'

16 According to Article 5 of Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ 2008 L 44, p. 23), which replaced the Eighth Directive with effect from 1 January 2010:

'Each Member State shall refund to any taxable person not established in the Member State of refund any VAT charged in respect of goods or services supplied to him by other taxable persons in that Member State or in respect of the importation of goods

into that Member State, in so far as such goods and services are used for the purposes of the following transactions:

(a) transactions referred to in Article 169(a) and (b) of Directive 2006/112/EC;

(b) transactions to a person who is liable for payment of VAT in accordance with Articles 194 to 197 and Article 199 of Directive 2006/112/EC as applied in the Member State of refund.

Without prejudice to Article 6, for the purposes of this Directive, entitlement to an input tax refund shall be determined pursuant to Directive 2006/112/EC as applied in the Member State of refund.'

National legislation

17 As a result of Sections 26 and 39 of the Value Added Tax Act 1994, article 3 of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 and regulation 190 of the Value Added Tax Regulations 1995 in the version thereof following the Value Added Tax (Amendment) (No. 4) Regulations 2004, traders not established in the European Union are not entitled to recover input tax charged on the transactions referred to in Article 169(c) of the VAT Directive.

Pre-litigation procedure

18 On 13 January 2006, the Commission informed the United Kingdom authorities of its view that Article 2(1) of the Thirteenth Directive should not be understood as excluding the refund of VAT charged on goods or services used for the purposes of the insurance and financial transactions mentioned in Article 17(3)(c) of the Sixth Directive, the contents of which have been repeated in Article 169(c) of the VAT Directive. By e-mail of 12 May 2006, the United Kingdom expressed the opposite view, maintaining that its legislation was in compliance with the applicable European Union legislation.

19 The Commission therefore decided to initiate the procedure under Article 226 EC and sent the United Kingdom a letter of formal notice on 12 October 2006 accusing the United Kingdom of having failed to fulfil its obligations under Article 17(3) and (4) of the Sixth Directive and under Article 2(1) of the Thirteenth Directive.

20 Since it was not convinced by the arguments put forward by the United Kingdom in its letter of 14 December 2006, the Commission, by letter of 27 June 2007, issued a reasoned opinion to the United Kingdom inviting it to take the necessary measures to comply with the requirements of Articles 169 to 171 of the VAT Directive and Article 2(1) of the Thirteenth Directive within two months of its receipt.

21 The United Kingdom replied to the reasoned opinion by letter of 29 August 2007, in which it confirmed its interpretation of the Thirteenth Directive and of Articles 169 to 171 of the VAT Directive. The Commission, disagreeing with that interpretation and maintaining its own position concerning the incompatibility of the United Kingdom's legislation in that respect with the requirements of European Union law, decided to bring the present action.

The action

22 As a preliminary point, it must be observed that it is common ground that, under United Kingdom law, traders established outside the European Union are not entitled to recover input tax in that Member State in respect of goods or services used for the purposes of transactions falling within the categories mentioned in Article 169(c) of the VAT Directive, namely certain insurance and financial transactions.

23 Therefore, this action concerns solely the question whether Articles 169 to 171 of the VAT Directive and Article 2(1) of the Thirteenth Directive confer such a right on traders established outside the European Union.

24 According to Article 2(1) of the Thirteenth Directive, each Member State is to refund to any taxable person not established in the territory of the European Union any VAT charged in respect of services rendered or moveable property supplied to him in the territory of the country by other taxable persons or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of the Sixth Directive.

25 As far as concerns the reference to Article 17(3)(a) and (b) of the Sixth Directive in Article 2(1) of the Thirteenth Directive, it must be observed, first, that the wording of the Thirteenth Directive was not altered after the entry into force of the VAT Directive, Article 169(a) and (b) of which replaced Article 17(3)(a) and (b) of the Sixth Directive. Article 2(1) of the Thirteenth Directive must, therefore, be understood as referring to Article 169(a) and (b) of the VAT Directive.

26 Second, it must be observed that the insurance and banking transactions at issue in the present case are referred to in Article 169(c) of the VAT Directive.

27 The United Kingdom, relying on the wording of Article 2(1) of the Thirteenth Directive, which expressly mentions only the transactions referred to in Article 169(a) and (b), contends that there is no entitlement to a refund of VAT with respect to the transactions referred to in Article 169(c) thereof.

28 On the other hand, the Commission, while accepting that Article 2(1) of the Thirteenth Directive does not refer to the transactions covered by Article 169(c) of the VAT Directive, submits, relying on arguments derived from the drafting history, the general scheme and the purpose of the relevant provisions, that Article 2(1) of the Thirteenth Directive, read in conjunction with Article 169 to 171 of the VAT Directive, must be understood as also conferring a right to a refund of VAT with respect to the transactions referred to in Article 169(c) of the VAT Directive.

29 Therefore, it must be determined whether the arguments put forward by the Commission in support of its interpretation of Article 2(1) of the Thirteenth Directive and Articles 169 to 171 of the VAT Directive are capable of justifying an interpretation to the effect that those articles confer a right to a refund of VAT for the transactions covered by Article 169(c) of the VAT Directive even though the wording of Article 2(1) of the Thirteenth Directive is clear and precise and refers only to Article 169(a) and (b) of the VAT Directive.

30 The Commission argues that the right of traders established outside the European Union to recover the input tax paid in a Member State for the purposes of the transactions referred to in Article 169(c) of the VAT Directive derives from Articles 169 to 171 of that directive. Article 170 establishes that right with respect to all the

transactions referred to in Article 169 and does not provide for any derogation. Since the VAT Directive lays down the basic rules, while the Thirteenth Directive contains only implementing provisions regulating the arrangements for refund, the unconditional wording of Article 170 of the VAT Directive must take precedence over the wording of Article 2 of the Thirteenth Directive.

31 It is true that Article 170 of the VAT Directive provides, in general terms, as did Article 17(3) of the Sixth Directive, for a right to the refund of input tax where the goods and services subject to VAT are used for the 'transactions referred to in Article 169' of the VAT Directive.

32 Similarly, it is common ground that the purpose of the Eighth Directive is to lay down detailed arrangements for the refund of VAT paid in a Member State by taxable persons established in another Member State, its objective being therefore to harmonise the right to refund as provided for in Article 17(3) of the Sixth Directive (see, inter alia, Case C-136/99 *Monte dei Paschi Di Siena* [2000] ECR I-6109, paragraph 20, and Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 26); that is also the case with respect to the Thirteenth Directive as far as concerns taxable persons established in non-member countries.

33 However, it cannot be concluded therefrom, as the Commission submits, that Article 170 of the VAT Directive permits a derogation from the clear and precise wording of Article 2(1) of the Thirteenth Directive.

34 The Thirteenth Directive does not merely regulate the formal arrangements for implementing the right to the refund of VAT, but provides for a number of derogations from that right, as the Commission acknowledges in its written observations without

challenging the validity. Among those derogations, in accordance with Article 2(2) of the Thirteenth Directive, is the Member States' power to make the refund conditional upon the granting by third States of comparable advantages and, in accordance with Article 4(2) thereof, to provide for the exclusion of certain expenditure or to make refunds subject to additional conditions.

35 Therefore, the provisions of the Thirteenth Directive and, in particular, Article 2(1) thereof, must be considered as a *lex specialis* as compared with Articles 170 and 171 of the VAT Directive, preventing the right to a refund, set out in general terms in Article 170, from overriding the clear and precise wording of Article 2(1) of the Thirteenth Directive.

36 It follows that the question whether the Member States are required to grant a right to the refund of VAT for the transactions referred to in Article 169(c) of the VAT Directive to taxable persons established outside the European Union must be determined solely by reference to Article 2(1) of the Thirteenth Directive.

37 As regards the interpretation of Article 2(1) of that directive, the Commission submits, first of all, that it is clear from the drafting history that it cannot be presumed that the legislature of the European Union, by just mentioning in Article 2(1) of the Thirteenth Directive the transactions referred to in Article 169(a) and (b), wished to exclude the refund of VAT for the transactions referred to in Article 169(c). The wording of Article 2(1) of the Thirteenth Directive is based on an erroneous interpretation by the legislature of the European Union when it adopted Article 2 of the Eighth Directive, which is in almost identical terms to, and served as a model for, the drafting of the former provision.

38 In that connection, the Commission relies, first, on the Explanatory Memorandum to the Proposal for the Eighth Directive and asserts that the legislature, when drafting the Eighth Directive, did not refer to Article 17(3)(c) of the Sixth Directive because it erroneously considered that the transactions concerned were already taken into account in Article 17(3)(a) thereof, as referred to in Article 2 of the Eighth Directive.

39 Next, according to the Commission, the logic of the VAT system requires a right to a refund of VAT to be granted for the transactions referred to in Article 169(c) of the VAT Directive. According to that logic and international practice, no tax should be due when goods or services are exported. As regards, in particular, exempt transactions such as the insurance and financial transactions for which it is not usually possible to recover input tax, Article 169(c) of the VAT Directive is intended to make possible the recovery of the VAT inherent in the price of purchasing goods and services used for the performance of those transactions. Thus, the grant of a right to a refund of VAT prevents the trader established in the European Union from being disadvantaged compared with his competitors outside the Union.

40 Finally, the Commission takes the view that the comparison made between Article 2(1) of the Thirteenth Directive and Article 2 of the Eighth Directive shows that those two provisions must be interpreted in the same way. Notwithstanding the almost identical wording of those provisions, the United Kingdom construes Article 2 of the Eighth Directive as including the transactions mentioned in Article 169(c) of the VAT Directive, the position thus adopted by that Member State being therefore inconsistent. According to the Commission, if the interpretation of Article 2(1) of the Thirteenth Directive put forward by the United Kingdom were correct, it should also apply to Article 2 of the Eighth Directive, which would lead to repercussions for all the Member States which adopt such an interpretation of that article.

41 First of all, the latter argument must be dismissed as irrelevant.

42 The present action for failure to fulfil obligations only concerns whether the United Kingdom has failed to fulfil its obligations under Articles 169 to 171 of the VAT Directive and Article 2(1) of the Thirteenth Directive by refusing the recovery of input tax for the transactions referred to in Article 169(c) of the VAT Directive carried out by taxable persons not established in the territory of the European Union.

43 Neither the fact that the United Kingdom and the other Member States grant such a right to a refund of VAT to traders established within the European Union, by virtue of the Eighth Directive, nor the absence of any reasons justifying a divergent practice as regards the traders referred to by that directive, on the one hand, and those covered by the Thirteenth Directive, on the other, nor any repercussions at Member State level in the absence of such reasons, are factors capable of supporting the Commission's interpretation of Article 2(1) of the Thirteenth Directive.

44 Next, as regards the argument based on the drafting history, it should be noted that Article 2 of the Proposal for the Eighth Directive, in which the Explanatory Memorandum referred to by the Commission appears, made reference, without further explanation, to 'transactions referred to in Article 17(3) of the Sixth Directive'. Therefore, it cannot be regarded as established that the – according to the Commission – incorrect assessment in the Explanatory Memorandum was in fact the basis for the wording of Article 2 of the Eighth Directive or that of Article 2(1) of the Thirteenth Directive.

45 Furthermore, Article 5 of Directive 2008/9, which replaced the Eighth Directive, refers, like Article 2 of the Eighth Directive, to Article 169 '(a) and (b)' of the VAT Directive. Therefore, the Commission's argument implies, first, that the legislature of the European Union committed an error when it adopted the Eighth Directive, which was reproduced in the Thirteenth Directive and, second, that the legislature committed the same error when it adopted Directive 2008/9.

46 As regards the alleged error and the Commission's argument that its reading of the relevant provision is also consistent with the logic of the common system of VAT, it must be observed that, even assuming the Commission's submissions are correct, it is not for the Court, as the Advocate General observed in point 65 of his Opinion, to make such an interpretation with the aim of correcting Article 2(1) of the Thirteenth Directive.

47 In that connection, the Court held in Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923 that the Hellenic Republic could legitimately base its national legislation on the clear wording of Article 23(2) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21) authorising it to apply to OUZO a rate of excise duty lower than the minimum rate. Thus, the Court dismissed the Commission's action alleging a failure by that Member State to fulfil its obligations under the first subparagraph of Article 90 EC, and in which it submitted that even where there is an explicit authorisation in secondary legislation, the Member States were in no way dispensed from the obligation to comply with primary legislation, so that, where a national provision was irreconcilable with primary legislation, the Member State was not entitled to rely on that authorisation.

48 In the same way, the United Kingdom, whose national law complies with the clear and precise wording of Article 2(1) of the Thirteenth Directive, cannot be accused of failing to fulfil its obligations specifically arising from that provision because it allegedly

failed to interpret that provision with the aim of correcting it, in order to comply with the overall logic of the common system of VAT and to remedy an error of the legislature of the European Union alleged by the Commission which, it claims, is apparent from the Explanatory Memorandum in the Proposal for the Eighth Directive.

49 According to settled case-law, the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 44 and the case-law cited).

50 It is true that that case-law refers to the relationship between individuals and public authorities. However, as the Advocate General observed in point 64 of his Opinion, that case-law is also relevant in the context of the transposition of a directive in the area of taxation.

51 The Court cannot, in the face of the clear and precise wording of a provision such as Article 2(1) of the Thirteenth Directive, interpret that provision with the intention of correcting it and thereby extending the obligations of the Member States relating to it (see, by analogy, Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, paragraph 44).

52 It follows from all of the foregoing that the Commission's action must be dismissed.

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Commission has been unsuccessful in its pleas, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]