JUDGMENT OF THE COURT (First Chamber)

6 April 2006 *

In Case C-245/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 26 May 2004, received at the Court on 10 June 2004, in the proceedings

EMAG Handel Eder OHG

v

Finanzlandesdirektion für Kärnten,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, M. Ilešič (Rapporteur) and E. Levits, Judges,

* Language of the case: German.

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2005,

after considering the observations submitted on behalf of:

— EMAG Handel Eder OHG, by W. Dellacher, Rechtsanwalt, assisted by A. Breschan, Wirtschaftsprüfer,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. De Bellis and G. Fiengo, avvocati dello Stato,

— the Government of the United Kingdom of Great Britain and Northern Ireland, by C. Jackson and S. Nwaokolo, acting as Agents, assisted by M. Angiolini, barrister,

— the Commission of the European Communities, by D. Triantafyllou and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) ('the Sixth Directive'), and in particular Article 8(1) thereof, relating to the place of supply of goods.

2 The reference arose in the course of proceedings between EMAG Handel Eder OHG ('EMAG'), established in Austria, and the Finanzlandesdirektion für Kärnten (the Carinthia Regional Tax Authority) concerning the deduction by EMAG of value added tax ('VAT') paid by way of input tax.

Legal context

The Sixth Directive

3 Article 2(1) of the Sixth Directive provides that: '(t)he following shall be subject to value added tax ... the supply of goods ... effected for consideration within the territory of the country by a taxable person acting as such'.

4 Under Article 5(1) of the Sixth Directive, '"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

5 Article 8 of the Sixth Directive, which is in Title VI thereof, entitled 'Place of taxable transactions', provides in subparagraphs 1(a) and (b):

'The place of supply of goods shall be deemed to be:

(a) in the case of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person: the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins ...

(b) in the case of goods not dispatched or transported: the place where the goods are when the supply takes place'.

6 Title XVIa, entitled 'Transitional arrangements for the taxation of trade between Member States', was added to the Sixth Directive by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and contains Articles 28a to 28m.

7 Article 28a of the Sixth Directive provides:

'1. The following shall also be subject to value added tax:

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 ... .

...

...

3. "Intra-Community acquisition of goods" shall mean acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported.

...

7. Member States shall take measures to ensure that transactions which would have been classed as "supplies of goods" as defined in ... Article 5 if they had been carried out within the territory of the country by a taxable person acting as such are classed as "intra-Community acquisitions of goods"'.

8 Article 28bA(1) of the Sixth Directive provides:

'The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends'.

9 The first subparagraph of Article 28c(a) states:

'Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Articles 5 and 28a(5)(a), dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods'.

10 Article 17(2)(a) and (d) and (3)(b) of the Sixth Directive, as amended by Article 28f(1) of that directive, provides:

'2. In so far as the goods ... 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 in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

...

(d) value added tax due pursuant to Article 28a(1)(a).

3. Member States shall also grant every taxable person the right to the deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods ... are used for the purposes of:

...

(b) transactions which are exempt pursuant to Article ... 28c(A)'.

National legislation

11 Paragraph 3(1), (7) and (8) of the Umsatzsteuergesetz (Austrian Law on Turnover Tax) 1994 ('the UStG 1994'), in the version in force at the material time, provides:

'1. "Supplies" are transactions in which an undertaking transfers to a customer or a third party authorised on his behalf the right to dispose of goods in his own name. The right to dispose of the goods may be procured by the undertaking itself or by a third party on its behalf.

...

7. The place of supply of goods is the place where the goods are located at the time when the power to dispose of them is procured.

8. If there is a supply of goods which are transported or dispatched to the customer or to a third party authorised on his behalf, the supply is to be treated as taking place at the time when the transport of the goods begins or at the time when they are handed over to the forwarding agent, carrier or shipper. Goods are dispatched where the undertaking instructs a carrier or shipper to transport them to a third party or entrusts such transport to a forwarding agent'.

12 Paragraph 3(8) was amended by the Steuerreformgesetz (Law on Tax Reform) 2000 (BGBl. I 106/1999) in order, according to the official explanatory notes, to comply with Article 8(1)(a) of the Sixth Directive, and is now worded as follows:

'If there is a supply of goods which are transported or dispatched by the supplier or customer, the place of supply of the goods shall be treated as being the place where the transport or dispatch to the customer or a third person on his behalf begins. Goods are dispatched when they are transported by a carrier or shipper or such transport is entrusted to a forwarding agent. Dispatch begins at the time when the goods are handed over to the forwarding agent, carrier or shipper'.

13 Paragraph 12(1)(1) of the UStG 1994, which sets out the relevant provisions relating to deduction of input VAT, provides:

'An undertaking may deduct the following amounts in input tax:

(1) Tax which has been included as a separate charge in invoices (Paragraph 11) from other undertakings in respect of supplies made within the territory of the Republic of Austria for the benefit of the undertaking ...'.

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

14 In 1996 and 1997, EMAG obtained non-ferrous metals from K GmbH ('K'), which was also established in Austria.

15 K itself acquired the goods concerned from suppliers in Italy or the Netherlands ('the suppliers'). It is not disputed that EMAG did not know who K's suppliers were. After each transaction was concluded, K instructed its suppliers to hand over those goods to a forwarding agent it had engaged to deliver those goods by lorry directly either to EMAG's premises in Austria or to those of EMAG's customers, also in Austria, in accordance with the instructions given to K by EMAG.

16 K invoiced EMAG the agreed purchase price of the goods and added Austrian VAT at the rate of 20%. EMAG subsequently claimed deduction of that tax as input VAT.

17 The competent Finanzamt (tax office) and, subsequently, the Carinthia Regional Tax Authority refused to allow that deduction on the ground that K had been wrong to include VAT in the invoice to EMAG. The latter brought an appeal before the Verwaltungsgerichtshof (Higher Administrative Court).

18 EMAG argues that Paragraph 3(8) of the UStG 1994 did not apply to supplies effected on its behalf by K since the instruction to despatch the goods to Austria was not given by it but by K. It points out that it was not aware of the identity of K's suppliers, that the latter was entitled to change the place of destination or the recipient at any time before relevant supply had been made and occasionally took advantage of that option, and that it was K that bore all the risk of loss or damage to the goods until they had been accepted by EMAG or one of its clients.

19 EMAG therefore considers that the place of the supply of goods effected on its behalf by K was in Austria so that K was liable to Austrian VAT in respect of those

supplies. K was therefore fully entitled to include that VAT in the invoice to EMAG and EMAG itself was entitled to claim deduction of it as input VAT.

20 According to the Regional Tax Authority, initially, K paid its suppliers for the goods, which placed them at K's disposal in the Netherlands or in Italy. Subsequently, K instructed a forwarding agent to be responsible for the carriage of goods from Italy or the Netherlands to Austria, where they were delivered to EMAG or, on its instructions, to its customers. The Regional Tax Authority points out that K effected the carriage of the goods in order to satisfy its obligation to supply the goods to EMAG and that the latter was aware of this.

21 In those circumstances, the Regional Tax Authority considers that Paragraph 3(8) of the UStG 1994 was applicable to the supplies made by K to EMAG. As the handing over of the goods to forwarding agents instructed by K took place in Italy or the Netherlands, the relevant place of the supplies effected by K on EMAG's behalf was in one or other of those Member States, in accordance with that provision. Under Paragraph 12(1)(1) of the UStG 1994, input VAT could have been deducted only if the transactions covered by the invoice had taken place in Austria. Since all the transactions took place in Italy or the Netherlands, it was unlawful for EMAG to deduct input VAT.

22 The national court found that, in the case pending before it, two separate supplies were implemented by a single physical movement of goods.

23 It takes the view that, under Article 8(1)(a) of the Sixth Directive, the place of the first supply of goods effected by the Italian or Dutch suppliers on behalf of K is the place where those goods were at the time when the dispatch or transport began, namely in Italy or the Netherlands. On the other hand, the place of the second supply, effected by K on behalf of EMAG, remains open to question.

24 In that regard, the national court considers that the wording of the first sentence of Article 8(1)(a) of the Sixth Directive does not provide any assistance in determining whether the intra-Community movement of goods is to be ascribed to the first supply alone or whether it can be ascribed to both supplies equally. In the second case, it questions whether the place of the second supply, effected by K on behalf of EMAG, is the actual place of departure of the goods (that is, in the main proceedings, Italy or the Netherlands) or the place where the first supply ended (that is, in the main proceedings, Austria).

25 It was in those circumstances that the Higher Administrative Court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is the first sentence of Article 8(1)(a) of the Sixth Council Directive ... to be interpreted as meaning that the place where dispatch or transport begins is relevant even when several undertakings enter into arrangements for the supply of the same goods and those arrangements are implemented by way of a single movement of goods?

(2) Are successive supplies to be treated as exempted intra-Community supplies when several undertakings enter into arrangements for the supply of the same

goods and those arrangements are implemented by way of a single movement of goods?

(3) If the answer to the first question is in the affirmative, is the place at which the second supply begins the actual place of departure of the goods or the place where the first supply finishes?

(4) Is the identity of the party having the right of disposal of the goods during their movement a relevant factor in answering the first, second and third questions?

Preliminary observations

26 First of all, it should be noted that under Directive 91/680, intended to achieve the elimination of fiscal barriers between Member States, the Community legislature definitively abolished the imposition of tax on imports and the remission of tax on exports in trade between Member States with effect from 1 January 1993 (second and third recitals in the preamble to that directive).

27 However, the Community legislature stated that conditions could not be brought about by that date that would permit the principle of the taxation in the Member State of origin of goods and services supplied to be implemented without prejudicing, as regards Community trade between taxable persons, the principle

that tax revenue from the imposition of tax at the final consumption stage should accrue to the benefit of the Member State in which the final consumption takes place. It therefore introduced, under Title XVIa of the Sixth Directive, transitional arrangements for the taxation of trade between Member States, based on a new chargeable event, namely the intra-Community acquisition of goods (seventh to tenth recitals in the preamble to Directive 91/680).

28 The first subparagraph of Article 28a(1)(a) of the Sixth Directive provides that, under certain circumstances, 'intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such are to be subject to VAT'. 'Intra-Community acquisition of goods' is defined in the first subparagraph of paragraph 3 of that article as '(the) acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported'.

29 As the Advocate General pointed out at points 23 to 25 of her Opinion, any intra-Community acquisition that is taxed in the Member State where the dispatch or intra-Community transport of goods ends under the first subparagraph of Article 28a(1)(a) has, as a corollary, an exempted supply in the Member State in which that dispatch or transport began under the first subparagraph of Article 28c(A)(a) of that directive.

30 Under the transitional arrangements laid down in Title XVIa of the Sixth Directive, firstly, the vendor effects an exempted supply in the Member State of the departure

of the dispatch or intra-Community transport of the goods in accordance with Article 8(1)(a) and the first subparagraph of Article 28c(A)(a) of that directive and, then, is granted by that Member State a deduction or refund of the VAT due or paid as input tax in that Member State in respect of those goods under Article 17(3)(b) of that directive, as amended by Article 28f(1) of that directive. For his part, the person acquiring the goods makes an intra-Community acquisition that is taxed in the Member State in which that dispatch or intra-Community transport ends under the first subparagraph of Article 28a(1)(a) and Article 28b(A)(1) of the Sixth Directive.

31 That mechanism enables the tax revenue to be transferred to the Member State in which final consumption of the goods supplied takes place.

Questions 2 and 4 referred for a preliminary ruling

32 By its second and fourth questions, which it is appropriate to consider together, the national court asks, in essence, whether, where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, both those supplies may constitute exempted supplies under the first subparagraph of Article 28c(A)(a) of the Sixth Directive and whether the identity of the person having the right to dispose of the goods during dispatch or transport, be it the first vendor, the intermediary acquiring the goods or the second person acquiring the goods, is a relevant factor in answering that question.

33 In a situation such as that at issue in the main proceedings, the two successive supplies could be exempted under the first subparagraph of Article 28c(A)(a) of the Sixth Directive only if the single intra-Community movement of goods were ascribed to both supplies equally.

34 If that were the case, there would be the following consequences.

35 Firstly, under Article 8(1)(a) of the Sixth Directive, the first vendor would effect a first supply in the Member State of the departure of the dispatch or transport of the goods. That first supply would be mirrored by a first intra-Community acquisition made by the intermediary acquiring the goods, situated, in accordance with Article 28b(A)(1), in the Member State of arrival of the dispatch or transport of the goods.

36 Next, the intermediary acquiring the goods would himself effect a second supply, also, under Article 8(1)(a) of the Sixth Directive, in the Member State of departure, that second supply in turn being mirrored by a second intra-Community acquisition by the second person acquiring the goods in the Member State of arrival.

37 Such a supply chain would be both illogical and contrary to the scheme of the transitional arrangements for the taxation of trade between Member States as described at paragraphs 26 to 31 above.

38 Firstly, even if two successive supplies give rise only to a single movement of goods, they must be regarded as having followed each other in time. The intermediary acquiring the goods can transfer the right to dispose of the goods as owner to the second person acquiring the goods only if it has previously been transferred to him by the first vendor and, therefore, the second supply can take place only after the first supply has been effected.

39 As the place of acquisition of the goods by the intermediary is deemed to be in the Member State of arrival of the dispatch or transport of those goods, it would be illogical for that taxable person to be deemed to have made the subsequent supply of those same goods from the Member State of the departure of that dispatch or transport.

40 Secondly, if the relevant provisions of the Sixth Directive are interpreted as meaning that the single intra-Community movement of goods is ascribed to only one of the two successive supplies, the purpose of the transitional arrangements under Title XVIa of that directive, namely to transfer the tax revenue to the Member State in which final consumption of the goods supplied takes place, can be easily attained. That transfer in fact occurs by means of the single transaction giving rise to an intra-Community movement of goods under the first subparagraph of Article 28c(A)(a) (exemption by the Member State of departure of the intra-Community dispatch or transport) in conjunction with Article 17(3)(b), as amended by Article 28f(1) (deduction or reimbursement by the Member State of departure of the VAT due or paid by way of input tax in that Member State), and the first subparagraph of Article 28a(1)(a) (taxation by the Member State of arrival of the intra-Community acquisition) of the Sixth Directive. That mechanism makes it possible to delimit clearly the authority to tax of the Member States concerned.

41 By contrast, the relevant provisions of the Sixth Directive cannot be interpreted as meaning that the single intra-Community movement of goods must be ascribed to both successive supplies equally.

42 Indeed, to ascribe the single intra-Community movement of goods also to the second intra-Community transaction would not have the effect of transferring the tax revenue to the Member State where final consumption of the goods supplied takes place, since that transfer has already occurred at the end of the first transaction, as was pointed out in paragraph 40 above.

43 Furthermore, it should be pointed out that if the single intra-Community movement of goods were ascribed to both successive supplies, Article 17(3)(b) of the Sixth Directive, as amended by Article 28f(1) of that directive, which is an essential provision of that system for the purposes of transferring tax revenue, would not serve any purpose as regards the second supply effected by the intermediary acquiring the goods since, necessarily, the latter would not have paid any input VAT in the Member State of the departure of the dispatch or intra-Community transport of the goods.

44 Moreover, in order to avoid the risk of tax loss, Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) (OJ 1992 L 24, p. 1) — replaced as from 1 January 2004 by Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1) — provided for a common system for the exchange of information on intra-Community transactions between the competent authorities of the Member States. The effect of the interpretation set out at paragraph 41 above would thus be to multiply the number of cases requiring such an exchange of information and, therefore, make the treatment of the transactions concerned by the competent tax authorities more cumbersome.

45 The answer to the second and fourth questions must therefore be that, where two successive supplies of the same goods, effected for consideration between taxable

`persons acting as such, gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax under the first subparagraph of Article 28c(A)(a) of the Sixth Directive. That interpretation holds good regardless of which taxable person — the first vendor, the intermediary acquiring the goods or the second person acquiring the goods — has the right to dispose of the goods during that dispatch or transport.

Question 1

46 The first point to be made with regard to the determination of the place where the supply is deemed to take place is that the Sixth Directive makes no distinction between 'intra-Community' supplies and 'internal' supplies. Article 8(1) of that directive makes a distinction only between supplies in which goods are dispatched or transported (subparagraph (a)), those in which goods are not dispatched or transported (subparagraph (b)) and those effected on board ships, aircraft or trains during the part of a transport of passengers effected within the Community (subparagraph (c)), the latter situation being irrelevant to the case in the main proceedings.

47 It follows from the answer to the second and fourth questions that, in a situation such as that at issue in the main proceedings, the single intra-Community movement of goods can be ascribed to only one of the two successive supplies.

48 In accordance with Article 8(1)(a) of the Sixth Directive, the place of that supply is deemed to be in the Member State of the departure of the dispatch or transport of the goods.

49 As the other supply does not involve dispatch or transport, the place of that supply is deemed, under Article 8(1)(b) of the Sixth Directive, to be the place where the goods are when that supply takes place.

50 If the first of the two successive supplies is the supply which involves intra-Community dispatch or transport of goods and which, therefore, has as a corollary an intra-Community acquisition taxed in the Member State of arrival of that dispatch or transport, the second supply is deemed to occur in the place of the intra-Community acquisition preceding it, that is, in the Member State of arrival. Conversely, if the supply involving intra-Community dispatch or transport of goods is the second of the two successive supplies, the first supply, which, necessarily, occurred before the goods were dispatched or transported, is deemed to occur in the Member State of the departure of that dispatch or transport.

51 The answer to the first question must therefore be that only the place of the supply which gives rise to dispatch or intra-Community transport of goods is determined in accordance with Article 8(1)(a) of the Sixth Directive; that place is deemed to be in the Member State of the departure of that dispatch or transport. The place of the other supply is determined in accordance with Article 8(1)(b) of that directive; that place is deemed to be either in the Member State of departure or in the Member State of arrival of that dispatch or transport, according to whether that supply is the first or the second of the two successive supplies.

Question 3

52 In light of the answer given to the first question, there is no need to answer the second question.

Costs

53 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 (First Chamber) hereby rules:

1. **Where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax under the first subparagraph of Article 28c(A)(a) 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 95/7/EC of 10 April 1995.

That interpretation holds good regardless of which taxable person — the first vendor, the intermediary acquiring the goods or the second person acquiring the goods — has the right to dispose of the goods during that dispatch or transport.

2. **Only the place of the supply which gives rise to dispatch or intra-Community transport of goods is determined in accordance with Article 8 (1)(a) of the Sixth Directive 77/388/EEC, as amended by Directive 95/7; that place is deemed to be in the Member State of the departure of that dispatch or transport. The place of the other supply is determined in accordance with Article 8(1)(b) of that directive; that place is deemed to be either in the Member State of departure or in the Member State of arrival of that dispatch or transport, according to whether that supply is the first or the second of the two successive supplies.**

[Signatures]