Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

11 June 2020*

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 17(2)(g) – Transfer of movable property within the European Union with a view to the supply of services – Articles 170 and 171 – Right to VAT refund of taxable persons not established in the Member State of refund – Directive 2008/9/EC – Concept of 'taxable person not established in the Member State of refund' – Taxable person not identified for VAT purposes in the Member State of refund)

In Case C-242/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul București (Regional Court, Bucharest, Romania), made by decision of 18 January 2019, received at the Court on 20 March 2019, in the proceedings

CHEP Equipment Pooling NV

v

Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București – Serviciul soluționare contestații,

Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București – Administrația fiscală pentru contribuabili nerezidenți,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, K. Jürimäe (Rapporteur) and N. Piçarra, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– CHEP Equipment Pooling NV, by E. Băncilă, avocat,

* Language of the case: Romanian.

– the Romanian Government, initially by E. Gane, L. Lițu and C.-R. Canțăr, then by E. Gane and L. Lițu, acting as Agents,

– the European Commission, by A. Armenia and L. Lozano Palacios, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11) ('the VAT directive') and of Article 2(1) and Article 3 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).

2 This request has been made in proceedings between CHEP Equipment Pooling NV ('CHEP'), a company established in Belgium, and the Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București – Serviciul soluționare contestații (National Agency for Tax Administration – Regional Directorate-General for Public Finance of Bucharest – Complaints Office, Romania) and the Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București – Administrația fiscală pentru contribuabili nerezidenți (National Agency for Tax Administration – Regional Directorate-General for Public Finance of Bucharest – Tax Authority for Non-resident Taxpayers, Romania) (together, 'the Romanian tax authorities'), concerning the refusal by those authorities to grant that company a refund of value added tax (VAT) paid in Romania.

Legal context

European Union law

The VAT directive

3 Article 17 of the VAT directive provides:

'1. The transfer by a taxable person of goods forming part of his business assets to another Member State shall be treated as a supply of goods for consideration.

"Transfer to another Member State" shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable person, for the purposes of his business, to a destination outside the territory of the Member State in which the property is located, but within the [European Union].

2. The dispatch or transport of goods for the purposes of any of the following transactions shall not be regarded as a transfer to another Member State:

…

(g) the temporary use of the goods within the territory of the Member State in which dispatch or transport of the goods ends, for the purposes of the supply of services by the taxable person established within the Member State in which dispatch or transport of the goods began;

…

3. If one of the conditions governing eligibility under paragraph 2 is no longer met, the goods shall be regarded as having been transferred to another Member State. In such cases, the transfer shall be deemed to take place at the time when that condition ceases to be met.'

4 Article 21 of that directive provides:

'The application by a taxable person, for the purposes of his business, of goods dispatched or transported by or on behalf of that taxable person from another Member State, within which the goods were produced, extracted, processed, purchased or acquired within the meaning of Article 2(1)(b), or into which they were imported by that taxable person for the purposes of his business, shall be treated as an intra-Community acquisition of goods for consideration.'

5 According to Article 44 of the same directive:

'The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.'

6 Article 170 of the same directive states:

'All taxable persons who, within the meaning of … Article 2(1) and Article 3 of [Directive 2008/9] 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 Under Article 171(1) of the VAT directive:

'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 rules laid down in [Directive 2008/9].'

8 Article 171a of the VAT directive provides:

'Member States may, instead of granting a refund of VAT pursuant to [Directive 2008/9] on those supplies of goods or services to a taxable person in respect of which the taxable person is liable to pay the tax in accordance with Articles 194 to 197 or Article 199, allow deduction of this tax pursuant to the procedure laid down in Article 168. …

To that end, Member States may exclude the taxable person who is liable to pay the tax from the refund procedure pursuant to [Directive 2008/9].'

9 Article 196 of the VAT directive provides:

'VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.'

10 According to Article 214(1)(a) and (b) of that directive:

'Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

(a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;

(b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT'.

Directive 2008/9

11 Article 1 of Directive 2008/9 states that the directive 'lays down the detailed rules for the refund of [VAT], provided for in Article 170 of [the VAT directive], to taxable persons not established in the Member State of refund, who meet the conditions laid down in Article 3'.

12 Article 2(1) and (2) of Directive 2008/9 contains the following definitions for the purposes of the directive:

'(1) "taxable person not established in the Member State of refund" means a taxable person within the meaning of Article 9(1) of [the VAT directive] who is not established in the Member State of refund but established in the territory of another Member State;

(2) "Member State of refund" means the Member State in which the VAT was charged to the taxable person not established in the Member State of refund 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'.

13 According to Article 3 of Directive 2008/9:

'This Directive shall apply to any taxable person not established in the Member State of refund who meets the following conditions:

(a) during the refund period, he has not had in the Member State of refund, the seat of his economic activity, or a fixed establishment from which business transactions were effected, or, if no such seat or fixed establishment existed, his domicile or normal place of residence;

(b) during the refund period, he has not supplied any goods or services deemed to have been supplied in the Member State of refund, with the exception of the following transactions:
(i) the supply of transport services and services ancillary thereto, exempted pursuant to Articles 144, 146, 148, 149, 151, 153, 159 or 160 of [the VAT directive];
(ii) the supply of goods and services to a person who is liable for payment of VAT in accordance with Articles 194 to 197 and Article 199 of [the VAT directive].'

14 Article 5 of Directive 2008/9 is worded as follows:

'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 the [VAT directive];

(b) transactions to a person who is liable for payment of VAT in accordance with Articles 194 to 197 and Article 199 of [the VAT directive] 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 [the VAT directive] as applied in the Member State of refund.'

Romanian law

15 Article 128 of the Legea nr. 571/2003 privind Codul fiscal (Law No 571 establishing the Tax Code), in the version applicable to the facts in the main proceedings ('the Tax Code'), provides:

'(1). "Supply of goods" shall mean the transfer of the right to dispose of property as owner.

…

(9). Intra-Community supply is a supply of goods, within the meaning of paragraph (1), which are dispatched or transported from one Member State to another Member State by the supplier or person to whom the supply is made, or by another person on their behalf.

(10). The transfer by a taxable person of goods forming part of his business from Romania to another Member State shall be treated as an intra-Community supply for consideration, except in cases provided for in paragraph (12) where there is no transfer.

(11). In accordance with paragraph (10), "transfer" shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable person, for the purposes of his business, from Romania to another Member State.

(12). For the purposes of this Title, the dispatch or transport of goods from Romania to another Member State by or on behalf of the taxable person for the purposes of the following transactions shall not constitute a transfer:

…

(g) temporary use of the goods in question within the territory of the Member State of destination of the goods dispatched or transported, for the purposes of supplying services in the Member State of destination, by the taxable person established in Romania;

…

(13). If one of the conditions referred to in paragraph (12) is no longer satisfied, the dispatch or transportation of the goods in question shall be regarded as a transfer from Romania to another Member State. In those cases, the transfer shall be deemed to be carried out at the time when that condition ceases to be met.'

16 According to Article 130a(2)(a) of the Tax Code:

'The following transactions shall be treated as an intra-Community acquisition for consideration:

(a) the application in Romania, by a taxable person, for the purposes of his business, of goods transported or dispatched by the same taxable person or by another person, on his behalf, from the Member State in whose territory the goods were produced, extracted, purchased, acquired or imported by him, in the course of his business, if the transport or dispatch of those goods, had it been carried out from Romania to another Member State, would be regarded as a transfer of goods to another Member State under Article 128(10) and (11); …'

17 Article147b(1)(a) of the Tax Code provides:

'Subject to conditions to be laid down by regulation:

(a) A taxable person not established in Romania but established in another Member State, who is not registered and not required to be registered for VAT purposes in Romania, shall be eligible for a refund of [VAT] paid on imports or acquisitions of goods or services carried out in Romania; …'

18 Point 49(1) of the Normele metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal (Provisions implementing the Tax Code) states:

'Under Article 147b(l)(a) of the Tax Code, any taxable person not established in Romania but established in another Member States shall be eligible for a refund of VAT paid on imports and acquisitions of goods or services carried out in Romania. The [VAT] shall be refunded by Romania, provided that the taxable person meets the following conditions:

(a) during the refund period he has not had in Romania the seat of his economic activity or a fixed establishment from which business transactions were effected or, if no such business or fixed establishment existed, his domicile or normal place of residence;

(b) during the refund period he was not registered or required to be registered for VAT purposes in Romania under Article 153 of the Tax Code;

(c) during the refund period he has not supplied any goods or services deemed to have been supplied in Romania, with the exception of the following transactions:
   1. the supply of transport services and services ancillary thereto, exempted pursuant to Article 143(1)(c) to (m) and Articles144(1)(c) and 144a of the Tax Code;
   2. the supply of goods and services to a person liable for VAT under Article 150(2) to (6) of the Tax Code.'

19 Article 153(5)(a) of the Tax Code is worded as follows:

'A taxable person not established in Romania and not registered for VAT purposes in Romania, who intends to:

(a) carry out an intra-Community acquisition of goods for which he is liable for the tax under Article 151; …

…

shall submit an application for identification for VAT purposes pursuant to this article, before carrying out the transactions'.

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

20 CHEP, a company established in Belgium, rents out pallets at European level. For this purpose, CHEP purchases pallets in various Member States, which it hires to other undertakings in the CHEP group in each Member State, which then sub-rent them to clients in their respective Member States.

21 From 1 October to 31 December 2014, CHEP purchased pallets from a Romanian supplier. The sale price invoiced by the Romanian supplier included VAT. The pallets at issue were transported from the premises of the Romanian supplier to another destination also located in Romania.

22 CHEP then rented those pallets to CHEP Pooling Services Romania SRL ('CHEP Romania'), a company established in Romania, together with pallets that it had purchased in other EU Member States and had transported in order to rent them in Romania. CHEP Romania sub-rented the various pallets to Romanian clients, who were able to dispatch them to Romania, to other Member States or to third States. The pallets used for the transport of goods declared for export were then returned to Romania, to CHEP Romania, which declared them on import and re-invoiced their value together with the VAT thereon to CHEP.

23 In June 2015, CHEP applied to the Romanian tax authorities for a refund of the VAT invoiced by the Romanian supplier of the pallets and of the VAT re-invoiced by CHEP Romania.

24 By decision of 14 April 2016, the Tax Authority for Non-resident Taxpayers, Bucharest refused to allow that refund. By decision of 11 October 2016, the Complaints Office, Bucharest rejected the complaint made by CHEP against that refusal.

25 The grounds for both of those decisions were that CHEP was required to be registered for VAT purposes in Romania under Article 153(5) of the Tax Code. The Romanian tax authorities found that CHEP rented to CHEP Romania not only pallets purchased in Romania but also pallets that it had purchased in other Member States and transported to Romania for the purpose of that rental. The pallets purchased in other Member States were therefore the subject of a transaction treated as an intra-Community acquisition in Romania, meaning that CHEP had to be registered for VAT purposes in Romania.

26 On 3 April 2017, CHEP brought an action before the Tribunalul București (Regional Court, Bucharest, Romania) seeking annulment of the decisions of 14 April and 11 October 2016 and the repayment of the VAT which was the subject of its refund application.

27 Before that court, CHEP submitted first, that, in accordance with Directive 2008/9, as a company established in Belgium, it was entitled to a refund of the VAT irrespective of any requirement to be registered for VAT purposes in Romania; secondly, that it was not required to be registered for VAT purposes in Romania since the transfers of the pallets could not be treated as intra-Community acquisitions; and thirdly, that it satisfied the legal conditions for a VAT refund. CHEP also claimed that Directive 2008/9 had been transposed incorrectly into Romanian law, in that Romanian law made VAT refunds subject to a condition, which was not contained in the directive, requiring the taxable person not to be registered for VAT purposes in Romania.

28 The tax authorities contend that, in the absence of any evidence that the pallets at issue, purchased in Member States other than Romania, were returned to the Member State from which they had been dispatched or transported to Romania, CHEP was unable to claim that the dispatch to Romania of the pallets purchased in other Member States constituted a non-transfer for the purposes of Article 128(12)(g) and (h) of the Tax Code.

29 In the light of those arguments, the referring court considered it necessary to obtain clarification on cases of non-transfer for the purposes of Article 17(2) of the VAT directive and on the requirement for a non-resident company to be registered for VAT purposes where it does not have the technical and human resources in Romania to carry out taxable transactions in that State, but merely provides services in respect of which the place of the transaction for VAT purposes is Romania. The referring court also asks whether the right to a VAT refund could be made conditional on the taxable person being neither registered nor required to be registered for

VAT purposes in the Member State of refund. With regard to the latter point, it commented that the provisions of Romanian law appeared to be contrary to Directive 2008/9, under which entitlement to a refund is not subject to any such condition.

30 In those circumstances, the Tribunalul București (Regional Court, Bucharest) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the transport of pallets from one Member State to another Member State, for the purposes of their subsequent rental in the latter Member State to a taxable person established and registered for VAT purposes in Romania, constitute a non-transfer in accordance with Article 17(2) of [the VAT directive]?

(2) Irrespective of the answer to the first question, is the taxable person under Article 9(1) of [the VAT directive], who is not established in the Member State of refund but in the territory of another Member State, considered a taxable person under Article 2(1) of [Directive 2008/9], even where that person is registered for VAT purposes or would be required to be registered for VAT purposes in the Member State of refund?

(3) In the light of the provisions of [Directive 2008/9], does the condition of not being registered for VAT purposes in the Member State of refund constitute a further condition to those laid down in Article 3 of [Directive 2008/9] in order that a taxable person established in another Member State and not established in the Member State of refund may be entitled to a refund in a case such as the present?

(4) Must Article 3 of [Directive 2008/9] be interpreted as precluding a practice of a national administration of refusing to refund VAT on grounds of failure to satisfy a condition laid down exclusively in national law?'

Consideration of the questions referred

The first question

31 By its first question, the referring court seeks, in essence, to ascertain whether Article 17(2)(g) of the VAT directive must be interpreted to mean that the transfer, by a taxable person, of goods from one Member State to the Member State of refund, for the purposes of the rental of those goods, by that taxable person, in the latter Member State, should be treated as an intra-Community supply.

32 As a preliminary point, it should be noted that, according to settled case-law, when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 19 April 2018, *Firma Hans Bühler*, C-580/16, EU:C:2018:261, paragraph 33 and the case-law cited).

33 Article 17(1) of the VAT directive treats certain transfers of goods, namely transfers of goods to another Member State, as intra-Community supplies.

34 Article 17(2) of the VAT directive lists a series of situations, which are not to be regarded as transfers to another Member State under Article 17(1) thereof.

35 Since Article 17(2) of the VAT directive contains an exhaustive list of derogations, it must be interpreted strictly (see, to that effect, judgment of 6 March 2014, *Dresser-Rand*, C-606/12 and C-607/12, EU:C:2014:125, paragraph 27).

36 Furthermore, that provision must be interpreted in the light of the objective of the transitional arrangements relating to VAT applicable to intra-Community trade established by the VAT directive, which is to transfer the tax revenue to the Member State in which final consumption of the goods supplied takes place (see, to that effect, judgment of 6 March 2014, *Dresser-Rand*, C-606/12 and C-607/12, EU:C:2014:125, paragraph 28).

37 It is in the light of the foregoing considerations that Article 17(2)(g) of the VAT directive, which is the specific subject of the questions referred, must be interpreted.

38 Under that provision, the dispatch or transport of goods for the temporary use of those goods within the territory of the Member State in which dispatch or transport of the goods ends, for the purposes of the supply of services by the taxable person established within the Member State in which dispatch or transport of the goods began, is not to be regarded as a transfer to another Member State.

39 It follows from the very wording of that provision that its application is expressly subject to cumulative conditions under which, first, the use in the Member State of destination of the goods dispatched or transported for the purposes of the supply of services by the taxable person concerned must be temporary and, secondly, the goods must have been dispatched or transported from the Member State in which that taxable person is established.

40 First, it is thus apparent from that provision that, in accordance with the objectives of the transitional arrangements relating to VAT applicable to intra-Community trade, it is only where the transfer of goods to another Member State is carried out not for the purpose of final consumption of the goods in that Member State, but for a temporary use of the goods in that Member State, that such a transfer is not to be classified as an intra-Community supply if the other conditions are satisfied (see, to that effect, judgment of 6 March 2014, *Dresser-Rand*, C-606/12 and C-607/12, EU:C:2014:125, paragraph 30).

41 However, it would be contrary both to the wording of Article 17(2)(g) of the VAT directive and to the requirement for a strict interpretation and the objectives of the transitional arrangements relating to VAT applicable to intra-Community trade to extend the application of that provision to cases where the goods are used for an indefinite or extended period or for a use leading to their destruction.

42 Secondly, it must be noted that it is clear from the very wording of Article 17(2)(g) of the VAT directive, according to which the goods at issue must be dispatched or transported from the Member State in which the taxable person is established, that that provision does not apply to situations in which the goods at issue are dispatched or transported from Member States other than that in which that taxable person is established.

43 In the present case, it is apparent from the documents before the Court that CHEP, which is established in Belgium, dispatched or transported pallets to Romania and used them in the context of services it supplied to CHEP Romania.

44 It is for the referring court, first, to determine, on the basis of an overall assessment of all the circumstances of the main proceedings, whether the use of the pallets in the context of the supply of services by CHEP is of a temporary nature. To that end, the referring court may, inter alia, take into account the terms of the rental contracts entered into between CHEP and CHEP Romania and the characteristics of the goods at issue.

45 Secondly, given that it is apparent from the information in the file before the Court that CHEP acquired pallets in different EU Member States, it is for the referring court to ensure that the pallets at issue were dispatched or transported to Romania from Belgium, the Member State in which CHEP is established.

46 If the referring court considers that both of those conditions are satisfied in the case in the main proceedings, it will have to conclude that, in accordance with Article 17(2)(g) of the VAT directive, the transfers of the pallets at issue should not be treated as intra-Community supplies.

47 If, on the other hand, either one of those conditions is not satisfied with regard to all or part of the transfers of the pallets at issue, those pallets must, under Article 17(1) of the VAT directive, be treated as intra-Community supplies, unless any of the other cases of derogation referred to in Article 17(2) is found to apply.

48 In the light of all of the foregoing considerations, the answer to the first question is that Article 17(2)(g) of the VAT directive must be interpreted as meaning that the transfer, by a taxable person, of goods from a Member State to the Member State of refund, for the purposes of the supply by that taxable person of services for the hiring out of those goods in the latter Member State, shall not be treated as an intra-Community supply where the use of those goods for the purposes of such a supply is temporary and they have been dispatched or transported from the Member State in which that taxable person is established.

The second, third and fourth questions

49 By its second, third and fourth questions, which it is appropriate to examine together, the referring court seeks, in essence, to ascertain whether the provisions of Directive 2008/9 must be interpreted as precluding a Member State from denying the right to a refund of VAT to a taxable person established in the territory of another Member State on the sole ground that that taxable person is or should have been registered for VAT purposes in the Member State of refund.

50 According to Article 1 of Directive 2008/9, the purpose of that directive is to define the rules for the refund of VAT, provided for in Article 170 of the VAT directive, to taxable persons not established in the Member State of refund, who meet the conditions laid down in Article 3 of Directive 2008/9.

51 Nevertheless, it is not the purpose of Directive 2008/9 to define the conditions for exercising the right to a refund, nor the extent of that right. The second subparagraph of Article 5 of Directive 2008/9 provides that, without prejudice to Article 6, and for the purposes of that directive, entitlement to a refund of VAT which is paid as an input tax is to be determined pursuant to the VAT directive as applied in the Member State of refund (judgment of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204, paragraph 35).

52 Consequently, the right of a taxable person established in a Member State to obtain the refund of VAT paid in another Member State, in the manner governed by Directive 2008/9, is the counterpart of such a person's right established by the VAT directive to deduct input VAT in his own Member State (judgment of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204, paragraph 36; see, in particular, to that effect, judgment of 28 June 2007, *Planzer Luxembourg*, C-73/06, EU:C:2007:397, paragraph 35).

53 Furthermore, the Court has clarified that, like the right to deduct, the right to a refund is a fundamental principle of the common system of VAT established by EU legislation, which is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT therefore ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves, in principle, subject to VAT (judgment of 2 May 2019, *Sea Chefs Cruise Services*, C-133/18, EU:C:2019:354, paragraph 35).

54 The method by which VAT is refunded, either by deduction or by refund, depends on the place of establishment of the taxable person (see, to that effect, judgment of 16 July 2009, *Commission* v *Italy*, C-244/08, not published, EU:C:2009:478, paragraphs 25 and 35). Thus, Article 170 of the VAT directive grants, subject to the conditions laid down therein, to 'all taxable persons who, within the meaning of … Article 2(1) and Article 3 of [Directive 2008/9] … are not established in the Member State in which they purchase goods and services or import goods subject to VAT' the right to obtain a VAT refund.

55 In that regard, under Article 3 of Directive 2008/9, a taxable person not established in the Member State of refund, within the meaning of Article 2(1) of that directive, is entitled to a refund of the VAT paid on two conditions. First, under Article 3(a) of that directive, during the refund period, the taxable person must not have had in the Member State of refund, the seat of his economic activity, or a fixed establishment, or his domicile or normal place of residence. Secondly, under Article 3(b) of the same directive, during that same period, he must not have supplied any goods or services deemed to have been supplied in the Member State of refund, with the exception of certain transactions specified in points (i) and (ii) of that provision. Those conditions are cumulative (see, to that effect, judgments of 6 February 2014, *E.ON Global Commodities*, C-323/12, EU:C:2014:53, paragraph 42, and of 21 September 2017, *SMS group*, C-441/16, EU:C:2017:712, paragraph 43).

56 However, neither Article 170 of the VAT directive, nor Article 3 of Directive 2008/9, nor any other provision of those directives make the right of a taxable person established in another Member State to obtain a VAT refund subject to any formal condition that the taxable person is not identified for VAT or required to be identified for VAT in the Member State of refund.

57 It follows that a Member State cannot, under its national law, refuse to grant a taxable person established in another Member State the right to a VAT refund on the sole ground that that taxable person is or should be identified for VAT in the first Member State, when that taxable person satisfies the cumulative conditions set out in Article 3 of Directive 2008/9.

58 Such an interpretation corresponds to the purpose of Directive 2008/9, which is to enable taxable persons to obtain a refund of input VAT where, in the absence of active taxable transactions in the Member State of refund, they could not deduct that input VAT paid from output VAT due (judgment of 25 October 2012, *Daimler and Widex*, C-318/11 and C-319/11, EU:C:2012:666, paragraph 40). The identification of a taxable person for VAT purposes in the Member State of

refund cannot validly be treated by the national legal order as demonstrating that that taxable person has in fact carried out supplies of goods or services in that Member State (see, to that effect, judgment of 6 February 2014, *E.ON Global Commodities*, C-323/12, EU:C:2014:53, paragraph 53).

59 That is all the more so given that the identification for VAT provided for in Article 214 of the VAT directive merely constitutes a formal requirement for the purposes of verification. Under settled case-law of the Court, the formal requirements cannot undermine, inter alia, the right of deduction, where the substantive conditions which give rise to that right are satisfied (see, to that effect, judgments of 21 October 2010, *Nidera Handelscompagnie*, C-385/09, EU:C:2010:627, paragraph 50, and of 14 March 2013, *Ablessio*, C-527/11, EU:C:2013:168, paragraph 32). It follows also, having regard to paragraph 52 of the present judgment, that a taxable person established in another Member State cannot, where the substantive conditions giving rise to that right are satisfied, be prevented from exercising that right on the ground that he is or should be identified for VAT in the Member State of refund.

60 Consequently, contrary to the position taken by the Romanian Government, a Member State cannot exclude a taxable person established in another Member State from a refund of VAT on the sole ground that that taxable person is or should be identified for VAT in the first Member State.

61 It must be stated in addition that only Article 171a of the VAT directive permits Member States, in relation to the specific transactions to which it refers, to grant to a taxable person established in another Member State a right of deduction, excluding him from the refund procedure under Directive 2008/9. However, quite apart from the fact that the Romanian Government did not opt to transpose this facility into the Romanian legal order, that provision is, in any event, not intended to draw a distinction between taxable persons who are and those who are not identified for VAT purposes in the Member State of refund.

62 In the present case, first, it is apparent from the information in the file before the Court that CHEP, being a taxable person established in another Member State, does not meet any of the criteria set out in Article 3(a) of Directive 2008/9 connecting it with Romania. Secondly, with regard to the condition set out in Article 3(b) of that directive, it is apparent from the information on file that, although, by renting the pallets in question to CHEP Romania, CHEP supplies services for which the place of supply is regarded under Article 44 of the VAT directive to be Romania, it is CHEP Romania which, under Article 196 of the VAT directive, is liable for the VAT under the reverse-charge mechanism. In those circumstances, and subject to verification by the referring court, it appears that a company such as CHEP satisfies the conditions set out in Article 3 of Directive 2008/9 and, therefore, is entitled to a refund of VAT.

63 In the light of all the foregoing considerations, the answer to the second, third and fourth questions is that the provisions of Directive 2008/9 must be interpreted as precluding a Member State from denying the right to a refund of VAT to a taxable person established in the territory of another Member State on the sole ground that that taxable person is or should have been identified for value added tax purposes in the Member State of refund.

Costs

64 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 (Ninth Chamber) hereby rules:

1. **Article 17(2)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008, must be interpreted as meaning that the transfer, by a taxable person, of goods from a Member State to the Member State of refund, for the purposes of the supply by that taxable person of services for the hiring out of those goods in the latter Member State, shall not be treated as an intra-Community supply where the use of those goods for the purposes of such a supply is temporary and they have been dispatched or transported from the Member State in which that taxable person is established.**

2. **The provisions 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, must be interpreted as precluding a Member State from denying the right to a refund of value added tax to a taxable person established in the territory of another Member State on the sole ground that that taxable person is or should have been identified for value added tax purposes in the Member State of refund.**

[Signatures]