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Judgment of the Court (Fifth Chamber) of 11 June 1998. - Société générale des grandes sources d'eaux minérales françaises v Bundesamt für Finanzen. - Reference for a preliminary ruling: Finanzgericht Köln - Germany. - Value added tax - Interpretation of Article 3(a) of the Eighth Council Directive 79/1072/EEC - Obligation of taxpayers not established in the country concerned to annex the original invoices or import documents to applications for a refund of the tax - Possibility of annexing a duplicate where the original has been lost for reasons beyond the control of the taxpayer. - Case C-361/96.

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Keywords

1 Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Tax refunds for taxpayers not established in the country concerned - Obligations of the taxpayer - Submission of original invoices or import documents - Possibility for Member States to allow submission of duplicate invoices or import documents where original lost for reasons beyond the control of the taxpayer - Whether permissible - Conditions

(Council Directive 79/1072, Art. 3(a))

2 Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Tax refunds for taxpayers not established in the country concerned - Documents to be produced in order to obtain a refund - Principle of non-discrimination - Obligation of Member States to allow taxpayers, regardless of the place where they are established, to use means of proof which only taxpayers established in the country concerned are permitted to rely on

(EC Treaty, Art. 6; Council Directive 79/1072)

Summary

3 Article 3(a) of the Eighth Directive 79/1072 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 - is to be interpreted as not precluding

Member States from providing in their national law that a taxable person who is not established in that Member State may prove his entitlement to a refund by submitting a duplicate invoice or import document where the original has been lost for reasons beyond his control, provided that the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.

Secondary law must comply with the general principles of law, and in particular the principle of proportionality. Exclusion of the possibility for a Member State to allow an application for a refund in such exceptional circumstances is not necessary to achieve the general aim of the Eighth Directive, which is to prevent fraud or tax evasion.

4 Where a taxable person established in a Member State may prove his entitlement to a refund of value added tax by submitting a duplicate or photocopy of the invoice if the original which he received has been lost for reasons beyond his control, the principle of non-discrimination set out in Article 6 of the Treaty and referred to in the fifth recital in the preamble to the Eighth Directive 79/1072 requires that the same possibility be extended to taxable persons not established in that Member State if the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.

Parties

In Case C-361/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht Köln (Germany) for a preliminary ruling in the proceedings pending before that court between

Société Générale des Grandes Sources d'Eaux Minérales Françaises

and

Bundesamt für Finanzen,

"on the interpretation of Article 3(a) of the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover tax - Arrangements for the refund of value added tax to persons not established in the territory of the country (OJ 1979 L 331, p. 11),$

THE COURT

(Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward and J.-P. Puissochet, Judges,

Advocate General: G. Cosmas,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Société Générale des Grandes Sources d'Eaux Minérales Françaises, by B. Hense, Manager, C&L Treuhand-Vereinigung Deutsche Revision AG, and K.P. Karig, Manager of the Tax Division, C&L Treuhand-Vereinigung Deutsche Revision AG, Frankfurt am Main,

- the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

- the Commission of the European Communities, by J. Grunwald, Legal Adviser, acting as Agent,$

having regard to the Report for the Hearing,

after hearing the oral observations of Société Générale des Grandes Sources d'Eaux Minérales Françaises, represented by H. Morin-Hauser, tax adviser of C&L Treuhand-Vereinigung Deutsche Revision AG, the German Government, represented by E. Röder, and the Commission, represented by J. Grunwald, at the hearing on 15 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 12 February 1998,

gives the following

Judgment

Grounds

1 By order of 29 August 1996, received at the Court on 12 November 1996, the Finanzgericht Köln (Finance Court, Cologne) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 3(a) of the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover tax - Arrangements for the refund of value added tax to persons not established in the territory of the country (OJ 1979 L 331, p. 11, hereinafter `the Eighth Directive').

2 The questions arose in proceedings between the Société Générale des Grandes Sources d'Eaux Minérales Françaises and the Bundesamt für Finanzen (the Federal Tax Office, hereinafter `the Bundesamt') on the issue of whether the plaintiff in those proceedings could produce as evidence of its entitlement to a refund of input VAT a duplicate invoice, the original having been lost for reasons beyond his control.

The Eighth Directive

3 Article 2 of 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 value added tax 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).'

4 Article 3(a) provides:

`To qualify for refund, any taxable person as referred to in Article 2 who supplies no goods or services deemed to be supplied in the territory of the country shall:

(a) submit to the competent authority referred to in the first paragraph of Article 9 an application modelled on the specimen contained in Annex A, attaching originals of invoices or import documents. Member States shall make available to applicants an explanatory notice which shall in any event contain the minimum information set out in Annex C.'

5 Annex C of the Eighth Directive, entitled `Minimum information to be given in explanatory notes', states in point H:

`The application shall be accompanied by the originals of the invoices or import documents showing the amount of value added tax borne by the applicant.'

6 Finally, Article 7(3) and (4) provides:

`3. The competent authority referred to in the first paragraph of Article 9 shall stamp each invoice and/or import document to prevent their use for further application and shall return them within one month.

4. Decisions concerning applications for refund shall be announced within six months of the date when the applications, accompanied by all the necessary documents required under this directive for examination of the application, are submitted to the competent authority referred to in paragraph 3. ...'

The German legislation

7 Paragraph 18(9) of the Umsatzsteuergesetz of 26 November 1979 (the German Law on Turnover Tax, hereinafter `the UStG') provides as follows:

`By way of exception to Paragraph 16 and paragraphs (1) to (4) and in order to simplify the tax collection procedure, the Federal Ministry of Finance may, by decree and subject to the approval of the Bundesrat, apply a special procedure, for undertakings not established in the territory of collection, for the refund of input tax. In such cases, the undertaking may be required to calculate the amount of the refund itself.'

8 The Umsatzsteuer-Durchführungsverordnung (Turnover Tax Implementing Regulation, `the UStDV') of 21 December 1979 lays down the special procedure for obtaining a refund of input tax. Paragraph 61(1) thereof provides as follows:

`The undertaking must apply for a refund on the form prescribed for the purpose to the Bundesamt für Finanzen or the tax office determined in accordance with the second sentence of Paragraph 5(1)(8) of the Finanzverwaltungsgesetz (Fiscal Administration Law). The application must be made within six months of the end of the calendar year in which entitlement to a refund arose. The undertaking must calculate the amount of the refund in its application. The application precludes further claims within the meaning of Paragraph 19(2) of the Law. The original invoices and import documents must be submitted with the application.'

9 Paragraph 163(1) of the Abgabenordnung (the German Tax Code, `the AO') of 16 March 1976 provides in addition:

`Taxes may be set at a lower level and bases of assessment which would increase them left out of account if levying the tax would be inequitable in the circumstances of an individual case. With the agreement of the taxpayer it is possible in the case of income tax for certain elements which increase the tax to be taken into account only at a later date and for others which reduce it to be taken into account in advance. The decision concerning such an exception may be linked to the determination of the tax.'

10 Paragraph 155(6) of the AO provides:

`The provisions relating to the determination of the tax are applicable by analogy to decisions on refund of tax.'

The facts

11 The plaintiff in the main proceedings is a company whose registered office is in France. In connection with the termination of a dealership agreement with Union Deutsche Lebensmittelwerke GmbH (hereinafter `UDL') it entered into an agreement with the latter in January 1989 in which it undertook to pay it DM 3 500 000, together with DM 490 000 by way of VAT.

12 The plaintiff claims that the original invoice drawn up by UDL was lost in the post when it was sent to the lawyers instructed by it to claim a refund of the VAT from the Bundesamt.

13 The plaintiff therefore had a duplicate of the original invoice made out by UDL which it submitted to the Bundesamt together with its application for a refund of VAT. The latter determined the amount of the refund by notice of 4 March 1993 but did not grant the application. The plaintiff challenged that decision before the Finanzgericht Köln, which dismissed the action as unfounded by a judgment of 3 July 1996. The plaintiff brought an appeal on a point of law against that judgment before the Bundesfinanzhof; that action is still pending.

14 Even before the proceedings concerning the notice of determination of the refund were concluded, the plaintiff also applied to the Bundesamt for the refund to be granted on equitable grounds in accordance with Paragraph 163(1) of the AO. In the notice of 4 March 1993, referred to above, determining the amount of the refund the Bundesamt refused to grant that application, too, on the grounds that Paragraph 61(1) of the UStDV required the original invoice to be annexed to the application for a refund. The plaintiff lodged an appeal against that decision before the Bundesministerium der Finanzen (the Federal Ministry of Finance), which was likewise dismissed on 7 June 1994.

15 The plaintiff then brought an action before the Finanzgericht challenging the refusal of the Bundesamt to grant a refund on equitable grounds in accordance with Paragraph 163(1) of the AO. It pointed out that the provision in the fifth sentence of Paragraph 61(1) of the UStDV is designed to prevent multiple refunds of VAT. However, such multiple refunds are precluded in this case because there is no doubt that the original invoice has not been used in order to obtain a refund of VAT. In the first place, the Bundesamt could easily verify that the tax authorities had not received a second application for reimbursement relating to the same transaction, since any such application would have had to have been submitted, in accordance with Paragraph 61(1), first sentence, of the UStDV, to the `Bundesamt für Finanzen or the tax office determined in accordance with the second sentence of Paragraph 5(1)(8) of the Finanzverwaltungsgesetz'. In the second place, the original could no longer be used in future to obtain a refund of VAT since no application was made within the time-limit laid down in the second sentence of Paragraph 61 of the UStDV, that is to say, within six months of the end of the calendar year in which entitlement to the refund arose. The plaintiff claims that there is therefore no risk that acceptance of the duplicate invoice would permit a double refund of VAT.

16 In the circumstances the plaintiff considers that strict application of the fifth sentence of Paragraph 61(1) of the UStDV leads to too rigorous a result, which should be mitigated by the application of equitable principles. Furthermore, strict application of the fifth sentence of Paragraph 61(1) of the UStDV would also run counter to the principles of proportionality and neutrality of VAT laid down by Community law.

17 The Bundesamt considers that a refund of VAT based, on equitable grounds, on a duplicate would run counter to the intention of the authors of the UStDV. According to Paragraph 61(1), fifth sentence, of the UStDV, the possibility of multiple refunds of VAT can be safely excluded only if the original invoices are submitted. The Bundesamt also points out that the fifth sentence of Paragraph 61(1) of the UStDV corresponds to Article 3 of the Eighth Directive.

18 The Finanzgericht observes that the German Federal Ministry of Finance based its refusal on the fact that Article 3(a) of the Eighth Directive makes no provision for any exception to the obligation to submit the original invoice with the application for a refund, even on grounds of equity where loss of the original is not attributable to the person seeking a refund.

19 It points out that on a literal interpretation of Article 3(a) of the Eighth Directive submission of the original documents is a mandatory requirement which permits of no exceptions in any circumstances whatsoever. That interpretation reflects the purpose of Article 3(a), which is to ensure that multiple refunds of VAT are not obtained by fraudulent means. However, there is more risk of that occurring in the case of applications for refunds submitted by undertakings established in a different Member State. It points out that the fact that the competent authorities are required by Article 7(3) of the Eighth Directive to stamp each invoice or import document in order to ensure that those documents are not used again for another application, and the obligation set out in Article 7(4) to settle applications for refunds within six months of submission of the requisite documents, may be taken as an indication that the procedure for obtaining refunds was designed to be a simplified procedure in which the requirements of speed and certainty must take precedence over the objective justice of the result.

20 It raises the question, however, whether such an interpretation of Article 3(a) of the Eighth Directive is compatible with the principle of neutrality of VAT set out in the second recital in the preamble to the directive, and the principle of non-discrimination set out in both Article 95 of the EC Treaty and the fifth recital in the preamble to the directive, inasmuch as if the original invoice has been received by an undertaking established in Germany and subsequently lost through no fault of its own, the undertaking may deduct the input VAT on production of a duplicate or a photocopy of the invoice and thus obtain an equitable result on the basis of the amount shown on the duplicate or the photocopy.

21 Article 3(a) of the Eighth Directive should perhaps therefore be interpreted as defining the basic rules governing entitlement to refund of VAT whilst leaving Member States a margin of discretion regarding the conditions under which such entitlement arises, and in particular the type of evidence required; or as providing, as a general rule, that originals must be submitted but authorises Member States to permit derogations from that rule in exceptional circumstances, in particular where, as in this case, the loss of the original is not attributable to the undertaking established in another Member State; or, again, as requiring duplicates to be accepted where, as in this case, the refusal to accept them would place undertakings established in another Member State at a disadvantage compared with those established in the Member State concerned.

22 Lastly, the German court notes that this case is closely linked to another, Reisdorf, which concerns the question whether deduction of input VAT paid by an undertaking established in the Member State concerned depends on whether or not that undertaking is in possession of the original document; that case was pending before the Court of Justice at the relevant time (Case C-85/95 [1996] ECR I-6257).

23 In those circumstances, the Finanzgericht decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

`1. Does Article 3(a) of the Eighth Council Directive of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes preclude the Member States from providing in their national law that a taxable person referred to in Article 2 of the directive may prove his entitlement to a refund by submitting a duplicate invoice or import document where the original has been lost for reasons beyond his control?

2. Should the first question be answered in the negative, does it follow from the prohibition on discrimination under Community law and from the principle of neutrality of turnover taxes that a taxable person referred to in Article 2 of the directive has the right to prove his entitlement to a refund by submitting a duplicate of the invoice or import document referred to in Article 3(a) where the original has been lost for reasons beyond his control?'

The first question

24 Article 3(a) of the Eighth Directive provides expressly that in order to qualify for a refund of input VAT, any taxable person not established in the territory of the country concerned may `submit ... an application ... attaching originals of invoices or import documents'. Annex C to the directive, which determines the minimum information to be given in the explanatory notes to be provided by Member States for taxpayers seeking a refund, confirms in point H that `[t]he application shall be accompanied by the originals of the invoices or import documents showing the amount of value added tax borne by the applicant'.

25 That the original document must be annexed to the application for a refund is also borne out by Article 7(3) of the Eighth Directive, which states that `[t]he competent authority ... shall stamp each invoice and/or import document to prevent their use for further application ...'.

26 The result of those provisions is that applications for a refund submitted in accordance with the Eighth Directive by a taxpayer who is not established in the Member State concerned must, in principle, be accompanied by the original invoices or import documents establishing the amount of VAT in respect of which a refund is sought.

27 Those provisions of the Eighth Directive differ from Article 18(1)(a) and Article 22(3) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), according to which exercise of the right to deduct input tax is normally dependent on possession of the original of the invoice or of the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice, as the Court held in Reisdorf, cited above, at paragraph 22.

28 The different wording reflects the general purpose of the Eighth Directive, which is stated in the sixth recital in the preamble as being that of preventing `certain forms of tax evasion or avoidance' and the aim pursued in particular by Article 7(3) of the directive of preventing undertakings not established in the Member State concerned from re-using the invoice or import document to make further applications for a refund.

29 Nevertheless, Article 3(a) of the Eighth Directive cannot be interpreted as precluding Member States from accepting such an application for a refund in exceptional circumstances where there is no doubt that the transaction which led to the application for a refund occurred, where the loss of the invoice or import document is not attributable to the taxpayer and where it is established that, in view of the circumstances, there is no risk of further applications for a refund.

30 In that connection the Court has held that secondary law must comply with the general principles of law, and in particular the principle of proportionality (Case 114/76 Bela-Mühle v Grows-Farm [1977] ECR 1211, paragraphs 5 to 7). Exclusion of the possibility mentioned is not necessary in this case to prevent fraud or tax evasion.

31 The reply to the first question must therefore be that Article 3(a) of the Eighth Directive is to be interpreted as not precluding Member States from providing in their national law that a taxable person who is not established in that Member State may prove his entitlement to a refund by submitting a duplicate invoice or import document where the original has been lost for reasons beyond his control, provided that the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.

The second question

32 The second question asks in essence whether, where a taxpayer established in a Member State may prove his entitlement to a refund of VAT by submitting a duplicate or photocopy of the invoice if the original invoice which he received has subsequently been lost for reasons beyond his control, the principles of non-discrimination and neutrality of VAT require such a possibility to be extended to taxpayers not established in that Member State.

33 According to the order making the reference, where the original invoice has been received by an undertaking established in Germany and is subsequently lost for reasons beyond his control, he may deduct input VAT on production of a duplicate or photocopy of the invoice and obtain an equitable result on the basis of the amount shown on the duplicate or photocopy.

34 Furthermore, in accordance with the principle of non-discrimination set out in Article 6 of the EC Treaty, the fifth recital in the preamble to the Eighth Directive expressly records that the directive `must not lead to the treatment of taxable persons differing according to the Member State in the territory of which they are established'. However, it is settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see inter alia Case C-279/93 Schumacker [1995] ECR I-225, paragraph 30).

35 The German Government claims that the absence of an exception to the obligation to attach the original document to cover cases where the original has been lost through no fault of the taxpayer is justified by the risk of misuse of documents other than the original where applications for a refund of VAT are made by taxpayers not established in the Member State concerned, whose accounts and operating methods, unlike those of taxpayers established in the country concerned, cannot be checked by the competent authorities and in respect of whom the procedure for requesting administrative assistance between the Member States is generally lengthy and unproductive.

36 Those reasons cannot in any event justify different treatment of taxpayers depending on whether they are established in the Member State concerned or elsewhere, if the transaction which led to the application for a refund occurred, if the loss of the invoice or import document is not attributable to the taxpayer concerned and if there is no risk of further applications for a refund.

37 In so far as in such a situation the principle of non-discrimination requires taxpayers not established in the Member State concerned to be permitted to prove their entitlement to a refund of VAT by submitting a duplicate or photocopy of the invoice under the same conditions as taxpayers established in the Member State concerned, it is not necessary to examine the second question in the light of the principle of neutrality of VAT.

38 The reply to the second question is therefore that where a taxable person established in a Member State may prove his entitlement to a refund of VAT by submitting a duplicate or photocopy of the invoice if the original which he received has been lost for reasons beyond his control, the principle of non-discrimination set out in Article 6 of the Treaty and referred to in the fifth recital in the preamble to the Eighth Directive requires that the same possibility be extended to taxable persons not established in that Member State if the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.

Decision on costs

Costs

39 The costs incurred by the German Government, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Finanzgericht Köln by order of 29 August 1996, hereby rules:

1. Article 3(a) of the 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 is to be interpreted as not precluding Member States from providing in their national law that a taxable person who is not established in that Member State may prove his entitlement to a refund by submitting a duplicate invoice or import document where the original has been lost for reasons beyond his control, provided that the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.

2. Where a taxable person established in a Member State may prove his entitlement to a refund of value added tax by submitting a duplicate or photocopy of the invoice if the original which he received has been lost for reasons beyond his control, the principle of non-discrimination set out in Article 6 of the EC Treaty and referred to in the fifth recital in the preamble to the Eighth Directive 79/1072 requires that the same possibility be extended to taxable persons not established in that Member State if the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.