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Judgment of the Court (Fifth Chamber) of 7 May 1998. - Lease Plan Luxembourg SA v Belgian State. - Reference for a preliminary ruling: Rechtbank van eerste aanleg Brussel - Belgium. - Sixth VAT Directive - Car-leasing services - Fixed establishment - Rules governing reimbursement of VAT to taxable persons not established in the territory of the State - Principle of non-discrimination. - Case C-390/96.

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Keywords

1 Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Supply of services - Determination of relevant place for tax purposes - `Fixed establishment' within the meaning of the Sixth Directive - Definition - Company hiring out or leasing vehicles to customers established in another Member State

(Council Directive 77/388, Art. 9(1) and (2)(e))

2 Freedom to provide services - Principle of non-discrimination - Tax legislation - Reimbursement of value added tax to taxable persons not established in the territory of the country - National legislation providing for interest payable only from the date of service of notice to pay on the Member State and at a lower rate than that applied to the interest paid to taxable persons established in the territory of that State automatically on the expiry of the statutory time-limit for reimbursement - Not permissible

(EC Treaty, Art. 59; Council Directive 79/1072)

Summary

1 The term `fixed establishment' in Article 9(1) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted in such a way that

an undertaking established in one Member State which hires out or leases a number of vehicles to clients established in another Member State does not possess a fixed establishment in that other State merely by engaging in that hiring out or leasing.

When a leasing company does not possess in a Member State either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up or management decisions taken and thus to enable the services in question to be supplied on an independent basis, it cannot be regarded as having a fixed establishment in that State.

Moreover, it is clear from both the wording and the aim of Article 9(1) and 9(2)(e) of the Sixth Directive, and from the case-law of the Court, that neither the physical placing of vehicles at customers' disposal under leasing agreements nor the place at which they are used can be regarded as a clear, simple and practical criterion, in accordance with the spirit of the Sixth Directive, on which to base the existence of a fixed establishment.

2 It is contrary to Article 59 of the Treaty for national rules to provide that taxable persons not established in a Member State, who apply for a refund of value added tax in accordance with the Eighth Directive 79/1072 on the harmonisation of the laws of the Member States relating to turnover taxes, are entitled to interest only from such time as notice to pay was served on that Member State and at a lower rate than that applied to the interest paid to taxable persons established in the territory of that State automatically on the expiry of the statutory time-limit for reimbursement.

Parties

In Case C-390/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Rechtbank van Eerste Aanleg, Brussels, for a preliminary ruling in the proceedings pending before that court between

Lease Plan Luxembourg SA

and

Belgian State

on the interpretation of Article 9(1) 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) and of Articles 6 and 59 of the EC Treaty,

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: N. Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Lease Plan Luxembourg SA, by L. De Broe and L. Vandenberghe, of the Brussels Bar,

- the Belgian Government, by J. Devadder, General Adviser in the Ministry of Foreign Affairs, External Trade and Cooperation with Developing Countries, acting as Agent, and A. Destrycker, of the Brussels Bar,

- the Luxembourg Government, by R. Heinen, Attaché de Gouvernement in the Ministry of Finance, acting as Agent, and

- the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Lease Plan Luxembourg SA, the Belgian Government and the Commission at the hearing on 6 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 18 December 1997,

gives the following

Judgment

Grounds

1 By judgment of 26 November 1996, received at the Court on 2 December 1996, the Rechtbank van Eerste Aanleg (Court of First Instance), Brussels, referred for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 9(1) 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; `the Sixth Directive') and of Articles 6 and 59 of the EC Treaty.

2 Those questions were raised in the context of proceedings brought by Lease Plan Luxembourg SA (`Lease Plan'), established in Luxembourg, and the Belgian State concerning reimbursement of the value added tax (`VAT') paid by Lease Plan on the purchase of cars in Belgium and on car maintenance and repairs carried out in Belgium.

3 Article 9(1) of the Sixth Directive provides:

`The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides'.

4 Article 9(2) of the Sixth Directive, as amended by the Tenth Council Directive 84/386/EEC of 31 July 1984 on the harmonisation of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC - Application of value added tax to the hiring out of movable tangible property (OJ 1984 L 208, p. 58; `the Tenth Directive'), provides:

`However:

...

(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

- the hiring out of movable tangible property, with the exception of all forms of transport.'

5 Article 17(3) of the Sixth Directive sets out the principles governing the right to a deduction or refund of VAT paid on inputs.

6 The first sentence of Article 17(4) of the Sixth Directive adds:

`The Council shall endeavour to adopt before 31 December 1977, on a proposal from the Commission and acting unanimously, Community rules laying down the arrangements under which refunds are to be made in accordance with paragraph 3 to taxable persons not established in the territory of the country.'

7 On 6 December 1979, in accordance with that provision, the Council adopted 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 (OJ 1979 L 331, p. 11; `the Eighth Directive'), Article 7(4) of which provides:

`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. Refunds shall be made before the end of the abovementioned period, at the applicant's request, in either the Member State of refund or the State in which he is established. In the latter case, the bank charges for the transfer shall be payable by the applicant.

The grounds for refusal of an application shall be stated. Appeals against such refusals may be made to the competent authorities in the Member State concerned, subject to the same conditions as to form and time-limits as those governing claims for refunds made by taxable persons established in the same State.'

8 Lease Plan is a leasing company whose main business is the leasing of cars under hire purchase contracts.

9 Most of Lease Plan's contracts are with companies established in Luxembourg. The cars leased to them have been bought in Luxembourg, are insured with insurance companies in Luxembourg and are covered by comprehensive contracts under which the client companies pay an inclusive fee to cover financing, insurance, maintenance and repairs. The companies established in Luxembourg make these cars available to their own employees, some of whom live in Belgium, either in the frontier region or elsewhere. The garage operators established in Belgium used by the employees send their invoices to Lease Plan, which pays the VAT.

10 Lease Plan has also leased out some 10 cars, out of its fleet of nearly 1 000, to clients established in Belgium. Those cars were bought by Lease Plan in Belgium and, unlike those leased to the companies established in Luxembourg, are not covered by comprehensive contracts. Maintenance, insurance, repairs and taxes are all paid for by the clients established in Belgium.

11 Lease Plan applied for a refund of the VAT paid on the purchase in Belgium of the cars leased to clients established in Belgium and on the maintenance and repair by Belgian garage operators of the cars leased to companies established in Luxembourg.

12 The Belgian tax authorities refused to refund VAT as sought by Lease Plan on the ground that it carries out transactions in Belgium in respect of which it is liable for VAT. Those transactions included the repairs carried out on cars leased to clients established in Luxembourg, which did not fall within normal maintenance. Such repairs were not covered by the comprehensive contracts and constituted separate services performed at the place where the cars were situated. In addition, for the period subsequent to 1 January 1993, the Belgian tax authorities maintain that the fact that Lease Plan carries on an economic activity by possessing a fleet of vehicles in Belgium for rental purposes is enough for it to have a fixed establishment in Belgium within the meaning of Article 21(2) of the Belgian Law of 3 July 1969 enacting the Value Added Tax Code, as amended by the Law of 28 December 1992, which came into force on 1 January 1993 (`the Code').

13 Article 4(1) of the Code provides:

`Any person who, in the exercise of an economic activity, habitually and independently, with or without a view to profit, on a primary or ancillary basis, supplies goods or services covered by this Code, shall, irrespective of where the economic activity is carried on, be a taxable person'.

14 Under Article 21(1) and (2) of the Code:

`1. A service is supplied in Belgium when the place where it is deemed to take place in accordance with paragraphs 2 to 4 is in Belgium.

2. The place where a service is supplied is deemed to be the place where the supplier of the service has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

15 According to the Belgian tax authorities Lease Plan should, since it carries out transactions in Belgium in respect of which it is liable to pay VAT, be registered with the VAT authorities as a taxable person in Belgium and should apply for refunds in its quarterly VAT returns.

16 Following the Belgian tax authorities' decision, Lease Plan brought proceedings against the Belgian State before the Rechtbank van Eerste Aanleg, seeking repayment of the sum of BFR 7 669 095, together with interest thereon at the statutory rate.

17 Lease Plan claimed that it was entitled to the payment of interest at the statutory rate in the same way as a taxable person established in Belgium, in the event of a delay in refunding VAT. Where a taxable person established in Belgium makes a request, Article 76(1) of the Code provides for the excess amount still outstanding at the end of the year to be refunded within three months from the request. If the VAT is not refunded within the three-month period provided for in Article 76(1), the taxable person established in Belgium receives interest under Article 91(3) of the Code at the rate of 0.8% per month as from the expiry of the three-month period.

18 Where the application for a refund is made by a taxable person not established in Belgium,

however, Article 91(4) of the Code specifies that interest on arrears `is payable at the rate fixed for civil matters and according to the rules governing such matters'. It appears from the observations submitted to the Court that until 31 August 1996 the annual rate of interest applicable to such requests was 8% and that it was not due until formal notice to pay had been served on the Belgian State after the expiry of the six-month period laid down in Article 7(4) of the Eighth Directive.

19 Lease Plan does not challenge the six-month refund period which, for taxable persons not established in the territory of the country for the purposes of Article 7(4) of the Eighth Directive, is longer than the three-month period provided in Article 91(3) of the Code for taxable persons established in the territory of the country. In its view, such a difference may be justified by the fact that verification and repayment take longer for refunds to taxable persons not established in the territory of the country than for those established there.

20 In view of the uncertainty as to whether a pool of cars belonging to Lease Plan and driven in Belgium may be regarded as a fixed establishment within the meaning of the Sixth Directive and of the disagreement concerning the rate of interest applicable to the amount of VAT whose refund is sought, the Rechtbank decided to stay proceedings and seek a preliminary ruling by the Court on the following questions:

`(1) Must the term "fixed establishment" in Article 9(1) of the Sixth VAT Directive be interpreted as meaning that an undertaking from one Member State which hires or leases out a number of cars to customers established in another Member State has ipso facto, by virtue of that hiring, a fixed establishment in that other Member State?

(2) If the answer to the preceding question is in the affirmative: must Article 9(1) of the Sixth VAT Directive be interpreted as meaning that services consisting in the leasing out of vehicles can be regarded as being supplied from a fixed establishment in Belgium in the case where the supplier of the services has its established place of business in Luxembourg and where almost all contracts are negotiated and concluded from this place of establishment in Luxembourg with customers established in Luxembourg and only a limited number of vehicles (approximately 10 cars out of a fleet of almost 1 000 vehicles) are purchased in Belgium and maintained or repaired within Belgium?

(3) Must Articles 6 and 59 of the EEC Treaty be interpreted as meaning that foreign taxable persons, who receive goods or services in Belgium and subsequently request VAT refunds in respect of such goods or services pursuant to the Eighth VAT Directive, cannot, in the event of late reimbursement, be granted a lower rate of interest, which, moreover, begins to accrue only from the moment at which such foreign taxable persons serve formal notice on the Belgian State, whereas in the event of late reimbursement to Belgian taxable persons, the latter are granted a higher rate of interest which, automatically and without serving formal notice, begins to accrue as soon as the statutory time-limit for reimbursement has expired?'

The first question

21 It must first be noted that, following the judgment of 17 July 1997 in Case C-190/95 ARO Lease v Inspecteur der Belastingdienst Grote Ondernemingen, Amsterdam [1997] ECR I-4383, the parties to the main proceedings accepted at the hearing that Lease Plan did not, during the period to which the refund of VAT sought relates, have any fixed establishment in Belgium from which it supplied services.

22 It must next be pointed out that, as the Court noted at paragraph 12 of its judgment in ARO Lease, the fourth recital in the preamble to the Tenth Directive states `... as regards the hiring out of forms of transport, Article 9(1) [of the Sixth Directive] should, for reasons of control, be strictly

applied, the place where the supplier has established his business being treated as the place of supply of such services'. Such a consideration is, moreover, confirmed by Article 9(2)(e) of the Sixth Directive, as amended by the Tenth Directive.

23 As the Court stressed at paragraph 14 of the same judgment, since forms of transport may easily cross frontiers, it is difficult, if not impossible, to determine the place of their utilisation and in each case a practical criterion must therefore be laid down for charging VAT. Consequently, for the hiring out of all forms of transport, the Sixth Directive provided that the service should be deemed to be supplied not at the place where the goods hired out are used but, with a view to simplification and in conformity with the general rule, at the place where the supplier has established his business (Case 51/88 Hamann v Finanzamt Hamburg-Eimsbüttel [1989] ECR 767, paragraphs 17 and 18).

24 The Court further pointed out, at paragraph 15 of the ARO Lease judgment, that the place where the supplier has established his business is a primary point of reference inasmuch as there is no purpose in referring to another establishment from which the services are supplied unless reference to the main place of business does not lead to a rational result for tax purposes or creates a conflict with another Member State. Consequently, as the Court held at paragraph 16 of the same judgment, for a supply of services, reference to an establishment other than the main place of business is possible only if that establishment possesses a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis.

25 In that regard, the Court noted at paragraph 18 of ARO Lease that the services supplied in the leasing of vehicles consist principally in negotiating, drawing up, signing and administering the relevant agreements and in making the vehicles concerned, which remain the property of the leasing company, physically available to customers.

26 At paragraph 19 of the same judgment, the Court concluded that when a leasing company does not possess in a Member State either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up or management decisions taken and thus to enable the services in question to be supplied on an independent basis, it cannot be regarded as having a fixed establishment in that State.

27 That is also the situation in the main proceedings in the present case, as Lease Plan does not possess in Belgium either its own staff or a structure which has a sufficient degree of permanence.

28 Moreover, as the Court stated at paragraph 20 of the ARO Lease judgment, it is clear from both the wording and the aim of Article 9(1) and 9(2)(e) of the Sixth Directive, as amended, and from the judgment in Hamann, cited above, that neither the physical placing of vehicles at customers' disposal under leasing agreements nor the place at which they are used can be regarded as a clear, simple and practical criterion, in accordance with the spirit of the Sixth Directive, on which to base the existence of a fixed establishment.

29 The answer to the first question must therefore be that the term `fixed establishment' in Article 9(1) of the Sixth Directive must be interpreted in such a way that an undertaking established in one Member State which hires out or leases a number of vehicles to clients established in another Member State does not possess a fixed establishment in that other State merely by engaging in that hiring out or leasing.

The second question

30 In view of the answer to the first question, it is unnecessary to answer the second question.

The third question

31 By its third question, the national court wishes to know whether it is contrary to Articles 6 and 59 of the Treaty for national rules to provide that taxable persons not established in a Member State, who apply for a refund of VAT in accordance with the Eighth Directive, are entitled to interest only from such time as notice to pay was served on that Member State and at a lower rate than that applied to the interest paid to taxable persons established in the territory of that State automatically on the expiry of the statutory time-limit for reimbursement.

32 Rules such as those in issue in the main proceedings give taxable persons not established in the territory of the Member State concerned, on the expiry of the statutory time-limit for reimbursement, interest at a rate lower than that of the interest paid to taxable persons established in the territory of that State. In addition, whilst the latter receive interest automatically in the event of a delay in repayment, taxable persons who are not established in the territory of the Member State concerned are obliged, in order to obtain interest after the expiry of the statutory time-limit for reimbursement, to serve formal notice to pay on that State and to bear the cost of that additional formality.

33 Such rules, which treat taxable persons differently depending on whether they are established in the territory of the Member State concerned or not, are such as to constitute discrimination prohibited by Article 59 of the Treaty.

34 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 Finanzamt Köln-Altstadt v Schumacker [1995] ECR I-225, paragraph 30).

35 In that regard, the Belgian Government submits that taxable persons established in the Member State concerned and those established in other Member States in the same situation are treated identically. A taxable person established in another Member State who submits declarations to the Belgian tax authorities is entitled, in the event of a delay in repayment, to interest at the higher rate, automatically payable, in accordance with Article 91(3) of the Code. Conversely, a taxable person established in the Member State concerned who only irregularly engages in taxable economic activities and thus only very occasionally submits VAT returns is entitled, as from the service of notice to pay, to interest only at the lower rate provided for in Article 91(4) of the Code. The same is also true of a taxable person established in the Member State concerned who, although regularly subject to VAT with regard to his economic activities, submits an application for a refund of VAT in relation to a transaction of a not exclusively business nature.

36 However, the situation of a taxable person who is established in one Member State, who pursues a regular economic activity subject to VAT in that State and who seeks in the context of that activity a refund of the VAT paid on a transaction effected in a second Member State cannot be compared with that of a taxpayer established in the second Member State and who either pursues a taxable economic activity on an irregular basis there or seeks a refund of the VAT on a transaction of a not exclusively business nature.

37 The comparison must rather be drawn, as regards the rate of interest given and the date from which that interest is calculated, with the situation of a taxable person established in the territory of the Member State concerned who, like Lease Plan, pursues a regular economic activity subject to VAT and seeks in the context of that activity a refund of excess VAT paid.

38 In the event of a delay in repayment, such a taxable person who regularly submits returns to the tax authorities would be entitled, unlike a taxable person not established in the Member State

concerned, to interest payable automatically at a higher rate.

39 As no other ground has been put forward to justify such discrimination, it must be concluded that rules such as those in issue in the main proceedings are contrary to Article 59 of the Treaty, inasmuch as they give taxable persons not established in the territory of the Member State concerned interest only as from service of notice to pay on that State and at a rate lower than that applicable to the interest received automatically by taxable persons established in the territory of that State on the expiry of the statutory time-limit for reimbursement.

40 Since rules of the kind in issue in the main proceedings are caught by Article 59 of the Treaty, it is unnecessary to consider whether they are compatible with Article 6 of the Treaty.

41 The answer to the third question must therefore be that it is contrary to Article 59 of the Treaty for national rules to provide that taxable persons not established in a Member State, who apply for a refund of VAT in accordance with the Eighth Directive, are entitled to interest only from such time as notice to pay was served on that Member State and at a lower rate than that applied to the interest paid to taxable persons established in the territory of that State automatically on the expiry of the statutory time-limit for reimbursement.

Decision on costs

Costs

42 The costs incurred by the Belgian and Luxembourg Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Rechtbank van Eerste Aanleg, Brussels, by judgment of 26 November 1996, hereby rules:

1. The term `fixed establishment' in Article 9(1) 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 must be interpreted in such a way that an undertaking established in one Member State which hires out or leases a number of vehicles to clients established in another Member State does not possess a fixed establishment in that other State merely by engaging in that hiring out or leasing.

2. It is contrary to Article 59 of the EC Treaty for national rules to provide that taxable persons not established in a Member State, who apply for a refund of VAT in accordance with 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, are entitled to interest only from such time as notice to pay was served on that Member State and at a lower rate than that applied to the interest paid to taxable persons established in the territory of that State automatically on the expiry of the statutory time-limit for reimbursement.