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Judgment of the Court (Fifth Chamber) of 13 July 2000. - Ministre du Budget and Ministre de l'Economie et des Finances v Société Monte Dei Paschi Di Siena. - Reference for a preliminary ruling: Conseil d'Etat - France. - Turnover tax - Common system of value added tax - Refund of the tax to taxable persons not established in the country - Article 17 of the Sixth Directive 77/388/EEC and Articles 2 and 5 of the Eighth Directive 79/1072/EEC. - Case C-136/99.

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Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Refund of the tax to taxable persons not established in the territory of the country - Taxable person carrying out taxable transactions and exempt transactions in the Member State of establishment - Partial refund of tax - Method of calculation

(Council Directive 79/1072, Arts 2 and 5)

Summary

Articles 2 and 5 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 must be interpreted as meaning that:

- they grant taxable persons established in a Member State where only part of their transactions are taxed a right to partial refund of the VAT which has been charged in a Member State where they are not established on goods or services used for the purposes of their transactions in the Member State of establishment;

- the amount of VAT refundable is calculated, first, by determining which transactions give rise to a right to deduction in the Member State of establishment and, second, by taking account solely of the transactions which would also give rise to a right of deduction in the Member State of refund if they were carried out there and of the expenses giving rise to a right to deduction in the latter State.

(see para. 32 and operative part)

Parties

In Case C-136/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Conseil d'État (France) for a preliminary ruling in the proceedings pending before that court between

Ministre du Budget,

Ministre de l'Économie et des Finances

and

Société Monte Dei Paschi Di Siena,

on the interpretation of Articles 2 and 5 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 (OJ 1979 L 331 p. 11),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P. Jann, H. Ragnemalm (Rapporteur) and M. Wathelet, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Monte Dei Paschi Di Siena, by V. Lenoir and A. Mourre, of the Paris Bar, and A. Dal Ferro, of the Vicenza Bar,

- the French Government, by R. Abraham, Director of Legal Affairs in the Ministry of Foreign Affairs, and S. Seam, Foreign Affairs Secretary in the Legal Affairs Directorate of that Ministry, acting as Agents,

- the Greek Government, by G. Alexaki, Assistant Lawyer Department for European Affairs of the Legal Service of the Ministry of Foreign Affairs, and M. Apessos, Legal Representative in the State Legal Service, acting as Agents,

- the Commission of the European Communities, by E. Traversa and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Monte Dei Paschi Di Siena, of the French Government, of the Greek Government and of the Commission at the hearing on 17 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 13 April 2000,

gives the following

Judgment

Grounds

1 By decision of 5 March 1999, received at the Court on 19 April 1999, the Conseil d'État (Council of State) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 2 and 5 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 (OJ 1979 L 331 p. 11, hereinafter the Eighth Directive).

2 Those questions were raised in proceedings between Monte Dei Paschi Di Siena, established in Italy, and the Ministre du Budget and the Ministre de l'Economie et des Finances (Minister for the Budget and Minister for the Economy and Finance) in relation to refund of value added tax (hereinafter VAT) paid by that company in respect of expenditure incurred in France for the purposes of its business in Italy.

The Community legislation

The Sixth Directive

3 Article 17 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, hereinafter the Sixth Directive) provides:

1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

(b) value added tax due or paid in respect of imported goods;

(c) value added tax due under Articles 5(7)(a) and 6(3).

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

(a) transactions relating to the economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country;

(b) transactions which are exempt under Article 14(1)(i) and under Articles 15 and 16(1)(B), (C) and (D), and paragraph 2;

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

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

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.

4 Article 19(1) of the Sixth Directive provides:

The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

- as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),

- as denominator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which value added tax is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A(1)(a).

The proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.

The Eighth Directive

5 Article 2 of the Eighth Directive is worded as follows:

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).

6 Article 5 of the Eighth Directive provides:

For the purposes of this Directive, goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of Directive 77/388/EEC as applicable in the Member State of refund.

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

7 According to Article 6 of the Eighth Directive:

Member States may not impose on the taxable persons referred to in Article 2 any obligation, in addition to those referred to in Articles 3 and 4, other than the obligation to provide, in specific cases, the information necessary to determine whether the application for refund is justified.

The national legislation

8 Article 271(4) of the Code Général des Impôts (General Tax Code), as in force at the material time, provides:

The right to deduct shall arise, subject to the same conditions as if value added tax were payable, in the case of: ...

(d) transactions not taxable in France which are carried out by taxable persons in so far as those transactions would be eligible for deduction if they had been taxed in France. A decree adopted after consultation with the Conseil d'État shall fix the arrangements and limits for refunding the tax deductible in respect of those transactions; that decree may establish different rules according to whether the taxable persons are domiciled or established in the Member States of the European Economic Community or in other countries;

...

9 According to Article 242 OM(1) of Annex II to the General Tax Code:

Taxable persons established abroad may obtain a refund of the value added tax which they have been properly invoiced if, during the quarter or the calendar year to which the request for a refund relates, they did not have in France the seat of their activity or a permanent establishment ... or carried out there any transactions subject to value added tax within the meaning of Articles 256 to 259C of the Code Général des Impôts ...

10 Article 242 ON of the same annex states:

Value added tax shall be refunded to taxable persons established in a Member State of the European Economic Community where it was charged in respect of services supplied to them and movable goods which they acquired in, or imported into, France during the year or quarter referred to in Article 242 0M in so far as such goods and services are used to carry out, or for the purposes of:

(a) transactions which are taxed abroad but which would be eligible for deduction if they were taxed in France ...

11 Under Articles 212 and 219C of Annex II to the General Tax Code, taxable persons using goods and services both for transactions which are subject to VAT and for VAT-exempt transactions are authorised to deduct a fraction of the tax charged in respect of those goods and services, to be determined by applying the ratio between the amount of revenue subject to tax and the total revenue.

The main proceedings and the questions referred to the Court

12 Monte dei Paschi di Siena is a banking and financial establishment whose business headquarters is in Italy and which has a representative office in France. On the basis of Article 271 of the French General Tax Code and Article 242 0M of Annex II to that code, which transposed the Eighth Directive into French law, it applied for refund of the VAT charged on the expenditure incurred by it in France in connection with the setting up of that office during 1988 and 1989.

13 The tax authorities refused to grant that application, whereupon the defendant in the main proceedings brought an action seeking the same relief before the Tribunal Administratif de Paris (Administrative Court, Paris), which was dismissed by judgment of 24 November 1992.

14 By judgment of 13 March 1995 setting aside the previous judgment, the Cour Administratif d'Appel de Paris (Administrative Appeal Court, Paris) held that Monte dei Paschi di Siena was entitled to refund of VAT in France in the sum of FRF 125 244.60. That sum was arrived at by applying to the amount of VAT paid by the company in France a percentage corresponding to the proportion of its turnover in Italy which was taxed.

15 In its decision the Cour Administratif d'Appel took account of the fact that, in France, the representative office of Monte dei Paschi di Siena did not constitute a permanent establishment and that no banking or financial transactions capable of excluding the refund provided for in Article 242 0M of Annex II to the General Tax Code were carried out there. It also took into consideration the fact that, in Italy, Monte dei Paschi di Siena carried out at the same time both transactions that were subject to VAT and exempt transactions and that the activities of its representative office in France contributed to both categories without distinction.

16 The Ministre de l'Economie et des Finances then the appealed in cassation against the judgment of the Cour Administratif d'Appel on the ground that it had erred in law in its application of Article 271 of the General Tax Code and Articles 242 0M and 242 ON of Annex II to that code, considered in the light of the Eighth Directive. The Minister contended that those provisions are intended to transpose correctly into domestic French law the rules laid down by the Eighth Directive and that the latter does not contain detailed arrangements for partial refund of VAT which has been charged on goods or services used, in another Member State, for transactions which are not all subject to VAT there.

17 Entertaining doubts as to whether Monte dei Paschi di Siena was entitled to partial refund of the VAT paid by it in France and as to the proper method of calculating the amount of any such refund, the Conseil d'État stayed proceedings pending a preliminary ruling from the Court of the following questions:

1. Do [Articles 2 and 5] of the Eighth Directive have the effect of granting to taxable persons established in a Member State of the Community where they are taxed only on a part of their turnover a right to a partial refund of the tax charged in another Member State in respect of goods or services which they have used in order to carry out, in the State in which they are established, transactions of which some are not taxed.

2. If they do, to what method of determining the portion of refundable tax do those provisions refer, and, in particular, is that portion to be determined according to the rules applicable in the State where the taxable person is established, or according to the rules in force in the State required to make the refund?

The questions referred to the Court

18 The national court seeks essentially to ascertain whether Articles 2 and 5 of the Eighth Directive must be interpreted as granting taxable persons established in a Member State where only some of their transactions are taxed the right to partial refund of the VAT charged, in a Member State where they are not established, on goods or services which are used for the purposes of their transactions in the Member State of establishment and, if so, how the amount of the VAT to be refunded must be calculated.

19 Monte dei Paschi di Siena, the French and Greek Governments and the Commission contend that taxable persons are entitled to partial refunds and that the rules of the Member State making the refund must be relied on in calculating the refund. However, the Commission and the French Government differ regarding the respective roles of the rules of the Member State of establishment and those of the Member State of refund. According to the Commission, regard must be had to the rules of both States. Those of the Member State of establishment must first be taken into account in order to determine the extent of the right to deduction in that State, on which the right to refund in the other Member State depends. The rules of the Member State of refund then come into play in order to define the limits of the right to refund by reference to the transactions of the taxable person which would give rise to a right to deduction if they were carried out in its territory and to the expenses which that State allows to be taken into account. According to the French Government, only the rules of the Member State of refund are relevant in determining the amount of VAT refundable.

20 It must be observed that, pursuant to Article 17(4) of the Sixth Directive, the purpose of the Eighth Directive is to lay down detailed arrangements for the refund of VAT paid in a Member State by taxable persons established in another Member State. Its objective is therefore to harmonise the right to refund as provided for in Article 17(3) of the Sixth Directive.

21 Under Article 5 of the Eighth Directive, the right to refund of VAT is to be determined in accordance with Article 17 of the Sixth Directive, as applicable in the Member State of refund.

22 Article 17 of the Sixth Directive deals with the origin and scope of the right to deduct VAT. That right may be exercised to the extent to which the goods and services which gave rise to the payment of VAT are used for the purposes of the taxable person's transactions.

23 The Court has clarified the link existing between the right to deduction in the Member State of establishment and the right to a refund in another Member State where the expenditure is incurred. It has held that a taxable person who benefits from exemption and is consequently not

entitled to deduct input tax is not, in accordance with the objective pursued by the VAT directives, entitled to a refund of VAT paid in another Member State either (Case C-302/93 *Debouche v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-4495, paragraph 15).

24 In the particular case where the goods and services are used by the taxable person both for transactions giving rise to a right to deduction and for transactions not giving rise to any such right, Article 17(5) of the Sixth Directive provides that only such proportion of the VAT shall be deductible as is attributable to the former transactions. That proportion is to be determined, in accordance with Article 19 of the Sixth Directive, for all the transactions carried out by the taxable person.

25 Provided that the taxable person carries out both taxed transactions and exempt transactions in the Member State of establishment, he therefore enjoys a right to partial deduction in that State.

26 It must be inferred from the foregoing that, if that taxable person incurs expenditure in a Member State other than the Member State of establishment for the purposes both of his taxed transactions and his exempt transactions in the latter State, he has a right of partial refund in the first State.

27 In order to determine the amount of any refund in circumstances such as those in point in the main proceedings it is appropriate, pursuant to Article 2 of the Eighth Directive, to apply the provisions of Article 17(3)(a) of the Sixth Directive and verify whether the transactions in question would give rise to a right to deduction in the Member State of refund.

28 Thus, in the case of a taxable person carrying out taxed transactions and exempt transactions in the Member State where he is established, it is appropriate to consider whether the former transactions would also give rise to a right to deduction in the Member State of refund in the event of their being carried out there. If that is not the case, the said taxed transactions cannot be taken into account in calculating the amount of the refund. The apportionment carried out in accordance with Article 19 of the Sixth Directive must therefore, if necessary, be adjusted by reference to the transactions which would give rise to a right to deduction if they were carried out in the Member State of refund.

29 After the appropriate apportionment is carried out, it is necessary to determine what expenditure may be taken into account in calculating the refund. In that connection, reference must be made to Article 5 of the Eighth Directive, which provides that the right to refund is to be determined in accordance with Article 17 of the Sixth Directive, as applicable in the Member State of refund. That article must be construed as meaning that the expenditure to be taken into account is that which gives rise to a right to deduction in that State. The amount of the refund is determined by applying the apportionment to the VAT paid in respect of such expenditure.

30 The French Government submits that it does not have access to all the necessary information and that it cannot therefore determine the amount of any refund.

31 In that connection it must be observed that, whilst the Sixth Directive does not specify all the information which a Member State required to make a refund may need, it nevertheless imposes on it an obligation to pay a refund where the conditions are fulfilled for the VAT to be deductible in the Member State of establishment and in the Member State of refund, provided that the taxable person has incurred expenditure giving rise to a right to deduction in the latter State for the purposes of his transactions in the Member State where he is established. To facilitate compliance with that obligation, Article 6 of the Eighth Directive, in particular, enables the Member State of refund to ask the taxable person to provide the information needed to appraise the merits of his application for a refund.

32 It follows that the answer to the questions submitted must be that Articles 2 and 5 of the Eighth Directive must be interpreted as meaning that:

- they grant taxable persons established in a Member State where only part of their transactions are taxed a right to partial refund of the VAT which has been charged in a Member State where they are not established on goods or services used for the purposes of their transactions in the Member State of establishment;*
- the amount of VAT refundable is calculated, first, by determining which transactions give rise to a right to deduction in the Member State of establishment and, second, by taking account solely of the transactions which would also give rise to a right of deduction in the Member State of refund if they were carried out there and of the expenses giving rise to a right to deduction in the latter State.*

Decision on costs

Costs

33 The costs incurred by the French and Greek 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 Conseil d'État by decision of 5 March 1999, hereby rules:

Articles 2 and 5 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 must be interpreted as meaning that:

- they grant taxable persons established in a Member State where only part of their transactions are taxed a right to partial refund of the VAT which has been charged in a Member State where they are not established on goods or services used for the purposes of their transactions in the Member State of establishment;*
- the amount of VAT refundable is calculated, first, by determining which transactions give rise to a right to deduction in the Member State of establishment and, second, by taking account solely of the transactions which would also give rise to a right of deduction in the Member State of refund if they were carried out there and of the expenses giving rise to a right to deduction in the latter State.*