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Judgment of the Court (Fifth Chamber) of 15 March 2001. - Syndicat des producteurs indépendants (SPI) v Ministère de l'Economie, des Finances et de l'Industrie. - Reference for a preliminary ruling: Conseil d'Etat - France. - Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Second indent of Article 9(2)(e) of the Sixth VAT Directive - Determination of relevant place for tax purposes - Advertising services - Inclusion of services provided through the intermediary of a third party. - Case C-108/00.

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Keywords

Tax provisions Harmonisation of laws Turnover taxes Common system of value added tax Supply of services Determination of relevant place for tax purposes Advertising services Definition Services provided indirectly to an advertiser and invoiced to a third party who in turn invoices them to that advertiser Included

(Council Directive 77/388, Art. 9(2)(e), second indent)

Summary

$$The second indent of Article 9(2)(e) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, concerning the place where advertising services are supplied for tax purposes, must be interpreted as applying not only to advertising services supplied directly and invoiced by the supplier to a taxable advertiser but also to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser.

(see para. 22 and operative part)

Parties

In Case C-108/00,

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

Syndicat des Producteurs Indépendants (SPI)

and

Ministère de l'Économie, des Finances et de l'Industrie

on the interpretation of Article 9(2)(e) 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 COURT (Fifth Chamber),

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

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

Syndicat des Producteurs Indépendants (SPI), by C. Clément, avocat,

the French Government, by K. Rispal-Bellanger and S. Seam, acting as Agents,

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

having regard to the Report for the Hearing,

after hearing the oral observations of Syndicat des Producteurs Indépendants (SPI), of the French Government and of the Commission at the hearing on 9 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2000,

gives the following

Judgment

Grounds

1 By decision of 9 February 2000, received at the Court on 23 March 2000, the French Conseil d'État (Council of State) referred for a preliminary ruling under Article 234 EC a question on the interpretation of Article 9(2)(e) 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).

2 That question arose in proceedings for misuse of powers brought by the Syndicat des Producteurs Indépendants (hereinafter the SPI), a professional association of film producers, seeking annulment of an administrative instruction issued by the French Ministry of Economics,

Finance and Industry concerning the place where advertising services are supplied for the purposes of applying value added tax (hereinafter VAT).

The Community rules

3 The seventh recital in the preamble to the Sixth Directive is worded as follows:

Whereas the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards supplies of goods for assembly and the supply of services; whereas although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods.

4 In line with the objective laid down by that recital, 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.

5 Article 9(2) of the Sixth Directive sets out a number of exceptions to that principle. With regard to advertising services, it provides as follows:

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:

...

advertising services,

....

National legislation and practice

6 The provision of French law transposing Article 9(2) of the Sixth Directive is contained in Article 259 B of the Code Général des Impôts (General Tax Code). That national provision is in the following terms:

By way of derogation from the provisions of Article 259, the supply of the following services is deemed to take place in France where they are made by a supplier established outside France and where the recipient is liable to value added tax and has established his business or has a fixed establishment to which the service is supplied in France or, failing that, who has his permanent address or usual residence in France:

...

(3) advertising services;

...

The place where such services are supplied is deemed not to be France, even if the supplier is established in France, where the recipient is established outside the European Community or is liable to value added tax in another Member State of the Community.

7 Article 259 B of the General Tax Code was the subject of an administrative instruction dated 5 November 1998 (published in the Bulletin Officiel des Impôts of 13 November 1998, No 3 A-8-98, hereinafter the instruction of 5 November 1998). That instruction states, in point III:

Advertising services are supplied directly to a taxable advertiser.

According to the seventh recital in the preamble to the Sixth Directive, the determination of the place where supplies of advertising services are to be taxed as the place where the recipient of those services has his principal place of business is justified by the fact that the cost of those services, supplied between taxable persons, is included in the price of the goods. In so far as the recipient of the services customarily sells the goods or supplies the services advertised in the State where he has his principal place of business, and charges the corresponding VAT to the final consumer, the VAT based on the advertising service should itself be paid by that person to that State (...).

Consequently, for the purposes of applying Article 259 B of the General Tax Code, operations which are designed to promote the sale of goods or services and which are provided directly by the supplier of services to a taxable advertiser constitute advertising services.

The service must therefore be provided to the advertiser and invoiced to him.

The dispute between the parties and the question referred for a preliminary ruling

8 The SPI is a professional body established in France which represents producers of films, including advertising films. The documents before the Court show that tax inspections of the books of various of its members were carried out, resulting in disputes with the French tax authorities. Those disputes concerned the interpretation to be applied to the notion of the supply of advertising services with a view to determining the place in which that supply takes place for tax purposes in accordance with the Sixth Directive.

9 The French tax authorities consider, on the basis of the instruction of 5 November 1998, that producers of advertising films supply advertising services within the meaning of Article 9(2)(e) of the Sixth Directive when they invoice those services direct to the advertisers, but that they do not supply such services when they invoice them to advertising agencies who in turn invoice then to the advertisers. It follows that the exemption from VAT enjoyed in principle by film producers when the recipient of the services is established outside France is not recognised by the French tax authorities where the service is supplied through the intermediary of an advertising agency.

10 The SPI considers that that administrative practice is contrary to the Sixth Directive. For that reason, it brought proceedings before the Conseil d'État challenging the instruction of 5 November 1998 on the ground that it is ultra vires.

11 The Conseil d'État took the view that the response to be given to the plea put forward by the SPI in support of its action for annulment depends on the interpretation to be applied to the notion of the supply of advertising services within the meaning of the Sixth Directive. It therefore decided

to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Are advertising services, as referred to in Article 9(2)(e) of Directive 77/388/EEC of 17 May 1977, to be understood, as regards operations designed to promote the sale of goods or services, as meaning only services supplied directly and invoiced by the supplier of services to a taxable advertiser, to the exclusion of services of the same kind supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to that advertiser?

The question referred for a preliminary ruling

12 By this question, the national court seeks to ascertain whether the second indent of Article 9(2)(e) of the Sixth Directive is to be construed as meaning that it applies not only to advertising services supplied directly and invoiced by the supplier to a taxable advertiser but also to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser.

13 The French Government maintains that, where such services are supplied indirectly to the advertiser, they are not covered by the second indent of Article 9(2)(e) of the Sixth Directive. It claims that, as an exception to the rule laid down by Article 9(1) of the Sixth Directive, that provision must be construed narrowly. To make the system applicable to a given operation dependent solely on the purpose of that operation, disregarding the existence of a contractual relationship between the supplier and the advertiser, would be tantamount to including within the scope of the second indent of Article 9(2)(e) operations of any kind which are carried out for the benefit of any undertaking, whether or not an advertising agency, with a view to meeting the latter's needs in respect of the services supplied by it to an advertiser. This would result in an extremely wide interpretation encompassing an indeterminate number of operations.

14 The SPI and the Commission contend, by contrast, that the second indent of Article 9(2)(e) of the Sixth Directive is also applicable to services supplied indirectly to the advertiser. For the purposes of determining the place of taxation, that provision is based on the nature of the service provided, which is the only relevant criterion, and not on the capacity of the supplier or recipient of the service. Nothing in the wording of that provision justifies the conclusion that a direct contractual relationship must exist between the supplier and the advertiser. The nature of advertising services is not such that they must invariably be supplied directly to the ultimate customer. By imposing the condition that advertising services must be supplied directly to the advertiser, the instruction of 5 November 1998 has the effect of excluding recourse in that sphere to sub-contractors established in other Member States.

15 In this regard, it should be borne in mind that, as regards the relationship between Article 9(1) and Article 9(2) of the Sixth Directive, the Court has already pointed out that Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) lays down the general rule on the matter. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, second, non-taxation (Case 168/84 Berkholz v Finanzamt Hamburg-Mitte-Altstadt [1985] ECR 2251, paragraph 14, and Case C-327/94 Dudda v Finanzamt Bergisch Gladbach [1996] ECR I-4595, paragraph 20).

16 The Court has concluded from this that, for the purposes of interpreting Article 9 of the Sixth Directive, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1) (Dudda, cited above, paragraph 21).

17 The French Government's argument that the second indent of Article 9(2)(e) of the Sixth Directive should, as an exception to a rule, be narrowly construed must therefore be rejected.

18 As is also clear from paragraphs 22 and 23 of the judgment in Dudda, the scope of Article 9(2) of the Sixth Directive must be determined in the light of its purpose as set out in the seventh recital in its preamble, which is to establish a special regime applying to services supplied between taxable persons where the cost of the services is included in the price of the goods.

19 It follows that that provision must be interpreted as meaning that the criterion applied by it for determining the place in which services are deemed to be supplied is the nature of the services in question.

20 That interpretation is borne out by the fact that the Court has also held, albeit in a somewhat different context, first, that, in order to determine whether a given operation constitutes a supply of advertising services within the meaning of the second indent of Article 9(2)(e) of the Sixth Directive, it is necessary in each case to take account of all the circumstances surrounding the service in question and, second, that an operation may be characterised as a supply of advertising services even where it is not carried out by a supplier engaged in business as an advertising agency (Case C-68/92 Commission v France [1993] ECR I-5881, paragraph 17, and Case C-69/92 Commission v Luxembourg [1993] ECR I-5907, paragraph 18).

21 Consequently, that provision of the Sixth Directive also encompasses advertising services the cost of which is included in the price of the advertiser's goods and which were originally supplied not by the party with whom the advertiser contracts but by a supplier who is in a contractual relationship with that party.

22 The answer to the question referred by the national court must therefore be that the second indent of Article 9(2)(e) of the Sixth Directive must be interpreted as applying not only to advertising services supplied directly and invoiced by the supplier to a taxable advertiser but also to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser.

Decision on costs

Costs

23 The costs incurred by the French Government 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 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 question referred to it by the Conseil d'État by decision of 9 February 2000, hereby rules:

The second indent of Article 9(2)(e) 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 as applying not only to advertising services supplied directly and invoiced by the supplier to a taxable advertiser but also

to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser.