Case C-222/09

Kronospan Mielec sp. z o.o.

v

Dyrektor Izby Skarbowej w Rzeszowie

(Reference for a preliminary ruling from the

Naczelny S?d Administracyjny)

(Sixth VAT Directive – Article 9(2)(c) and (e) – Research and development work carried out by engineers – Determination of the place where services are supplied)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Supply of services – Determination, for taxation purposes, of the place where services are supplied

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

Services consisting of research and development work relating to the environment and technology, carried out by engineers established in one Member State on a contract basis for the benefit of a recipient established in another Member State, must be classified as ‘services of engineers’ within the meaning of Article 9(2)(e) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, which determines, for taxation purposes, the place where services are supplied in respect of the services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services.

Those services must be regarded as being covered by that provision since research and development work constitutes services which are principally and habitually carried out as part of the profession of engineer listed in that provision. That is true of services which are characterised by the fact that they involve not only the application of existing knowledge and procedures to specific problems, but also the acquisition of new knowledge and the development of new procedures designed to resolve those problems or new problems. Furthermore, such activities can be distinguished from those covered by Article 9(2)(c) of the Sixth Directive since the services in question are not provided for a number of different recipients, but are carried out for one single recipient. The fact that the sole recipient of services might find it necessary to sell, to third parties or to undertakings belonging to the same group as that of which it is part, the results of the work which it has commissioned is irrelevant in that regard.

(see paras 20-21, 24-26, 30, operative part)

JUDGMENT OF THE COURT (First Chamber)

7 October 2010 (*)

(Sixth VAT Directive – Article 9(2)(c) and (e) – Research and development work carried out by engineers – Determination of the place where services are supplied)

In Case C?222/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Naczelny S?d Administracyjny (Poland), made by decision of 23 April 2009, received at the Court on 18 June 2009, in the proceedings

Kronospan Mielec sp. z o.o.

v

Dyrektor Izby Skarbowej w Rzeszowie,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.?J. Kasel (Rapporteur), A. Borg Barthet, M. Ileši? and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2010,

after considering the observations submitted on behalf of:

– Kronospan Mielec sp. z o.o., by M. Soba?ska, adwokat, and T. Michalik, doradca podatkowy,

– the Polish Government, by M. Dowgielewicz, A. Kramarczyk and A. Rutkowska, acting as Agents,

– the Greek Government, by K. Georgiadis, Z. Chatzipavlou and V. Karra, acting as Agents,

– the European Commission, by D. Triantafyllou and K. Herrmann, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(2)(c) and (e) of 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’).

2 The reference has been made in proceedings between Kronospan Mielec sp. z o.o. (‘Kronospan’) and the Dyrektor Izby Skarbowej w Rzeszowie (Director of the Rzeszów tax chamber) concerning the determination, for the purpose of the imposition of value added tax

(‘VAT’), of the place where supplies of services are deemed to have been effected.

Legal context

The Sixth Directive

3 The seventh recital in the preamble to the Sixth Directive reads:

‘… 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; … 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 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)(c) and (e) of the Sixth Directive is worded as follows:

‘However:

…

(c) the place of the supply of services relating to:

– cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organisers of such activities, and where appropriate, the supply of ancillary services,

…

shall be the place where those services are physically carried out;

…

(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:

…

– services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information,

…’

National legislation

6 Article 27(2) No 3(a) of the Law of 11 March 2004 on the taxation of goods and services (Ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug, Dz. U. No 54, position 535), in the version applicable at the time of the facts in the main proceedings ('the VAT Law'), provided:

'In the case of services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as exhibitions and trade fairs and their connected services, the place where the services are supplied shall … be the place where the services are physically carried out ...'

7 Article 27(3) of the VAT Law was worded as follows:

'Where the services specified in Paragraph 4 are provided to:

(1) natural persons, legal persons or organisational units without legal personality, which have their place of residence or establishment within the territory of a non-member country, or to

(2) taxable persons having their place of residence or establishment within the Community but not in the same country as the supplier,

the place where the services are supplied shall be the place where the recipient of the service has established its business, has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where it has its permanent address or normal residence.'

8 Article 27(4) No 3 of the VAT Law provided:

'Paragraph 3 applies to consultancy services in the computer hardware sector …; in the software sector …; legal services, accountancy services, market research and opinion services, economic activity and management consultancy services …; services of architects and engineers … – subject to Paragraph 2 No 1; services in the field of technical investigations and analyses …; data processing and the supplying of information; translating.'

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

9 Kronospan, which has its registered office in Poland, provided, for a customer established in Cyprus, services in the field of technical investigations and analyses and carried out research and development work in the fields of natural sciences and technology.

10 Those supplies of services relate more specifically to work that encompasses the investigation and measurement of emissions, including the conduct of investigations relating to emissions of carbon dioxide (CO2) and trading in CO2 emissions, the preparation and checking of documentation in relation to such work and the analysis of potential sources of pollution linked to the manufacture of goods consisting mainly of wood. That work is carried out with the objective of acquiring new knowledge and new technological know-how aimed at the production of new substances, products and systems and the application of new technological procedures to production processes.

11 By letter of 8 December 2006, Kronospan requested from the tax authorities in Rzeszów a written interpretation concerning the application of certain provisions of Polish tax legislation in order to determine to what extent the services in question were to be regarded as having been carried out in Poland and not in the Member State in which the taxable person to which the services were supplied had its registered office, namely the Republic of Cyprus.

12 Kronospan took the view that those services had, in their entirety, to be classified as engineering work, with the result that the place of the supply of the services, as provided by Article 9(2)(e) of the Sixth Directive, had to be the place where the recipient of those services was established, namely Cyprus. By a ruling of 9 March 2007, however, the tax authorities in Rzeszów expressed the view that some of the transactions at issue in the main proceedings were scientific activities and that, consequently, the place of the supply of services was, pursuant to Article 9(2)(c) of the Sixth Directive, situated in Poland.

13 As the administrative appeal lodged by Kronospan against that ruling was dismissed by the Dyrektor Izby Skarbowej w Rzeszowie, Kronospan brought an action before the Wojewódzki S?d Administracyjny w Rzeszowie (Provincial Administrative Court, Rzeszów). That court dismissed the action on the ground that the services at issue were scientific activities and were not services of engineers.

14 The Naczelny S?d Administracyjny (Polish Supreme Administrative Court), before which the case has been brought, is unsure whether Article 9(2)(e) of the Sixth Directive is to be interpreted as meaning that the services of engineers referred to in that provision include research and development work carried out by those engineers. In so far as it is apparent from the case-law of the Court, and in particular from the judgment in Case C?41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, that the provisions of Article 9(2) do not refer to the professions mentioned in that article in themselves, but to the services normally supplied by those professionals, it could, in the view of the Naczelny S?d Administracyjny, be argued that all types of service regularly carried out by engineers are covered by Article 9(2)(e) of the Sixth Directive.

15 However, it points out, some of the services at issue in the main proceedings are ‘creative’ and ‘innovative’ in nature and have elements of scientific work which may be covered by Article 9(2)(c) of the Sixth Directive, notwithstanding the fact that those services are effected in the course of business and for a single recipient. The commercial nature of the scientific research cannot affect either the general nature of the results of those activities or their general future application. The services in question could therefore be regarded as being provided to a number of different recipients, with the result that one of the conditions for the application of that provision laid down by the Court, inter alia in Case C-114/05 *Gillan Beach* [2006] ECR I-2427, is satisfied in the present case.

16 Furthermore, the national court states that the costs of the services at issue in the present case are not included directly in the ‘price of the goods’, contrary to what is set out in the seventh recital in the preamble to the Sixth Directive. The price of acquiring those services is an element of the indirect costs incorporated in the selling price of all the goods and services offered by the recipient of those services.

17 In those circumstances, the Naczelny S?d Administracyjny decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘(a) Is the third indent of Article 9(2)(e) of [the] Sixth Council Directive … – now corresponding to Article 56(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1 …) – to be interpreted as meaning that the services of

engineers referred to therein, when provided to a person subject to VAT who is carrying out commissioned work encompassing those services for a recipient of services established in another Member State of the Community, are to be taxed at the place where the recipient of the services (the customer) has established its business or has a fixed establishment;

(b) or should it be concluded that such services, being services relating to scientific activities pursuant to the first indent of Article 9(2)(c) of the Sixth Directive (now corresponding to Article 52(a) of Directive 2006/112), must be taxed at the place where they are physically carried out,

on the basis that those services take the form of work that encompasses the investigation and measurement of emissions under legislation on environmental protection, including the conduct of investigations in connection with carbon dioxide (CO2) emissions and trading in CO2 emissions, the preparation and checking of documentation relating to that work and the analysis of potential sources of pollution, and that is carried out with the objective of acquiring new knowledge and new technological know-how directed at the production of new substances, products and systems and the application of new technological procedures within the production process?'

Consideration of the question referred

18 By its question the national court asks, in essence, whether services, such as those at issue in the main proceedings, consisting of research and development work relating to the environment and technology, carried out by engineers established in one Member State on a contract basis for the benefit of a recipient of those services established in another Member State, are to be classified as 'services of engineers' within the meaning of the third indent of Article 9(2)(e) of the Sixth Directive or as 'scientific activities' within the meaning of the first indent of Article 9(2)(c) of the Sixth Directive.

19 In order to answer that question, it must first of all be noted that the third indent of Article 9(2)(e) of the Sixth Directive does not refer to professions, such as those of lawyers, consultants, accountants or engineers, but to services. The European Union legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers (Case C?145/96 *von Hoffmann* [1997] ECR I?4857, paragraph 15).

20 Consequently, it is necessary to establish whether research and development work, such as that at issue in the main proceedings, constitutes services which are principally and habitually carried out as part of the profession of engineer listed in the third indent of Article 9(2)(e) of the Sixth Directive (see, to that effect, *von Hoffmann*, paragraph 16).

21 In that regard, it must be stated that the exercise of the profession of engineer covers services which are characterised by the fact that they involve not only the application of existing knowledge and procedures to specific problems, but also the acquisition of new knowledge and the development of new procedures designed to resolve those problems or new problems.

22 It cannot therefore reasonably be disputed that research and development activities constitute services which may principally and habitually be carried out by engineers.

23 While it is true that, as the national court has stated, the scientific activities covered by Article 9(2)(c) of the Sixth Directive are normally characterised by an innovative and creative aspect, the fact none the less remains that that circumstance alone is not such as to preclude a taxable person who carries out an activity or exercises a profession covered by another provision of that directive from, in turn, also finding it necessary to perform, principally and habitually, services which have such characteristics.

24 It is important to add that, as is apparent from the case-law of the Court, the services referred to in Article 9(2)(c) of the Sixth Directive are characterised, inter alia, by the fact that they are provided for a number of different recipients, that is to say, all the people taking part, in a variety of capacities, in cultural, artistic, sporting, scientific, educational or entertainment activities (see *Gillan Beach*, paragraph 23).

25 In the present case, however, it is clear from the order for reference that the services performed by Kronospan were not provided for a number of different recipients, but were carried out for one single Cypriot recipient which commissioned the research and development work at issue in the main proceedings. The fact that that sole recipient of services might find it necessary to sell, to third parties or to undertakings belonging to the same group as that of which it is part, the results of the work which it has commissioned is irrelevant in that regard. The dissemination, by the recipient of those services in the course of its business, of those results to a wider public does not allow the conclusion to be drawn that those services have been provided to a person other than that recipient.

26 It follows that services such as those at issue in the main proceedings must be regarded as being covered by Article 9(2)(e) of the Sixth Directive.

27 That finding is not called into question by the argument alluded to in paragraph 16 of the present judgment, according to which, in the main proceedings, the recipient of the services does not directly include the costs of those services in the price of the goods and services which it offers, with the result that those services come within the scope of Article 9(1) of the Sixth Directive.

28 First, as is apparent from the use of the words ‘in particular’ in the seventh recital in the preamble to the Sixth Directive, the scope of Article 9(2) of that directive is not restricted to services between taxable persons where the cost of the services is included in the price of the goods.

29 Secondly, the Sixth Directive does not contain anything which allows the conclusion to be drawn that the fact that the recipient includes the costs of the services not directly, but indirectly, in the price of the goods and services which it offers is relevant for the purposes of establishing whether a service is covered by Article 9(1) or (2) of the Sixth Directive.

30 In the light of the foregoing, the answer to the question referred is that services, such as those at issue in the main proceedings, consisting of research and development work relating to the environment and technology, carried out by engineers established in one Member State on a contract basis for the benefit of a recipient established in another Member State, must be classified as ‘services of engineers’ within the meaning of Article 9(2)(e) of the Sixth Directive.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Services consisting of research and development work relating to the environment and technology, carried out by engineers established in one Member State on a contract basis for the benefit of a recipient established in another Member State, must be classified as ‘services of engineers’ within the meaning of Article 9(2)(e) of 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.

[Signatures]

* Language of the case: Polish.