JUDGMENT OF THE COURT (Eighth Chamber)

25 October 2012 (*)

(Common system of value added tax — Directive 2006/112/EC — Articles 170 and 171 — Eighth VAT Directive — Article 1 — Directive 2008/9/EC — Article 3(a) — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country — Taxable persons established in one Member State and carrying out in another Member State only technical testing or research activities)

In Joined Cases C-318/11 and C-319/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Förvaltningsrätten i Falun (Sweden), made by decision of 21 June 2011, received at the Court on 27 June 2011, in the proceedings

Daimler AG (C-318/11),

Widex A/S (C-319/11)

v

Skatteverket,

THE COURT (Eighth Chamber),

composed of L. Bay Larsen (Rapporteur), acting President of the Eighth Chamber, A. Prechal and E. Jaraši?nas, Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2012,

after considering the observations submitted on behalf of:

– Daimler AG, by M. Punkki, advokat,

– Widex A/S, by M. Selin, jur. kand,

– the Skatteverket, by K. Alvesson, acting as Agent,

– the Swedish Government, by C. Meyer-Seitz, acting as Agent,

– the European Commission, by L. Lozano Palacios and J. Enegren, acting as Agents,

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

gives the following

Judgment

1 These references for a preliminary ruling relate to the interpretation of Article 1 of 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), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129; 'the Eighth Directive'), and of Article 3(a) of Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ 2008 L 44, p. 23).

2 The references have been made in two disputes between Daimler AG ('Daimler'), established in Germany, and Widex A/S ('Widex'), established in Denmark, respectively, and the Skatteverket (Swedish Tax Board), concerning the lawfulness of decisions of the Skatteverket rejecting their applications for the refund of value added tax ('VAT') paid in Sweden when goods or services were purchased.

Legal context

EU law

3 Article 170 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2007/75/EC of 20 December 2007 (OJ 2007 L 346, p. 13; 'the VAT Directive'), provides:

'All taxable persons who, within the meaning of Article 1 of [the Eighth Directive] … and Article 171 of this Directive, are not established in the Member State in which they purchase goods and services or import goods subject to VAT shall be entitled to obtain a refund of that VAT in so far as the goods and services are used for the purposes of [certain specific transactions].'

4 Article 171(1) of the VAT Directive states as follows:

'VAT shall be refunded to taxable persons who are not established in the Member State in which they purchase goods and services or import goods subject to VAT but who are established in another Member State, in accordance with the detailed implementing rules laid down in [the Eighth Directive].

…'

5 Article 1 of the Eighth Directive provides:

'For the purposes of this Directive, "a taxable person not established in the territory of the country" shall mean a person … who … has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected, nor, if no such seat or fixed establishment exists, his domicile or normal place of residence, and who … has supplied no goods or services deemed to have been supplied in that country, with the exception of [certain transport services and certain other services].'

6 Article 1 of Directive 2008/9 states:

'This Directive lays down the detailed rules for the refund of [VAT], provided for in Article 170 of [the VAT Directive], to taxable persons not established in the Member State of refund, who meet

the conditions laid down in Article 3.’

7 Article 3 of that directive reads as follows:

‘This Directive shall apply to any taxable person not established in the Member State of refund who meets the following conditions:

(a) … he has not had in the Member State of refund, the seat of his economic activity, or a fixed establishment from which business transactions were effected, or, if no such seat or fixed establishment existed, his domicile or normal place of residence;

(b) … he has not supplied any goods or services deemed to have been supplied in the Member State of refund, with the exception of [certain transport services and certain other services].’

8 Article 28 of that directive states:

‘1. This Directive shall apply to refund applications submitted after 31 December 2009.

2. [The Eighth Directive] shall be repealed with effect from 1 January 2010. However, its provisions shall continue to apply to refund applications submitted before 1 January 2010.

References to the repealed Directive shall be construed as references to this Directive except for refund applications submitted before 1 January 2010.’

Swedish law

9 It follows from the first subparagraph of Chapter 10, Paragraph 1, of the Law (1994:200) on value added tax (mervärdeskattelagen (1994:200); ‘ML’) of 30 March 1994 (SFS 1994, No 200) that a foreign economic operator, on application, is entitled to a refund of input tax on the condition that:

(1) the input tax concerns a purchase or import related to turnover in activities abroad;

(2) the turnover, in the event it is made within the European Union, is subject to taxation or gives rise to entitlement to refund corresponding to that referred to in Paragraph 11 or 12 in the country where the turnover is made; and

(3) the turnover would have been taxable or would have given rise to entitlement under Paragraph 11 or 12 to refund if the turnover had been made within Sweden.

10 Chapter 1, Paragraph 15, of the ML states that foreign economic operator means a trader who does not have the seat of his economic activities or a fixed establishment in Sweden and is not domiciled or has his normal place of residence there.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-318/11

11 Daimler, which has the seat of its economic activity in Germany, carries out winter testing of cars at testing installations in Northern Sweden. It has no staff permanently in Sweden. Testing staff are flown in for the test periods. The same is true of the advanced technical equipment used.

12 Daimler has a wholly-owned subsidiary in Sweden which provides it with premises, test tracks and services connected with the test activities. The staff of the Swedish subsidiary consists of four seasonal employees and a director.

13 Daimler does not carry out any activity subject to VAT at the installations in Sweden. The activities carried out in that Member State consist in the testing activities necessary to the car selling activities which Daimler carries out in Germany.

14 In the context of the testing of cars, Daimler has made acquisitions which have not been used for the purposes of any activity subject to VAT in Sweden.

15 On the basis of the rules on refund to foreign economic operators, Daimler applied to the Skatteverket for a refund of input VAT paid on its purchases.

16 Daimler's applications cover the periods from 1 January 2008 to 31 December 2008 and from 1 October 2009 to 31 December 2009. The sums claimed amount to a total of SEK 73 597 119. The applications for reimbursement relating to the period from 1 January 2008 to 31 December 2008 were submitted to the Skatteverket before 1 January 2010 while the applications for the period from 1 October 2009 to 31 December 2009 were submitted after 31 December 2009.

17 The Skatteverket decided not to grant a refund to Daimler on the ground that Daimler has a fixed establishment in Sweden. It has not referred to the existence of supplies of goods or services made by that undertaking in Sweden.

18 Daimler has appealed against the decision of the Skatteverket to the Förvaltningsrätten i Falun. It submits that it does not have a fixed establishment in Sweden.

19 The Skatteverket contends that the appeal should be dismissed.

20 In those circumstances, the Förvaltningsrätten i Falun has decided to stay the proceedings and refer the following questions to the Court:

'1. How is the expression "fixed establishment from which business transactions are effected" to be interpreted in an assessment on the basis of the relevant provisions of EU law?

2. Is a taxable person who has the seat of his economic activity in another Member State and whose activity principally consists of the manufacture and sale of cars, who has carried out winter testing of car models at installations in Sweden, to be regarded as having had a fixed establishment in Sweden from which business transactions have been effected where that person has acquired goods and services that were received and used at testing installations in Sweden without having his own staff permanently stationed in Sweden and where the testing activity is necessary to the performance of the person's economic activity in another Member State?

3. Does it affect the answer to question 2 if the taxable person has a wholly-owned Swedish subsidiary, the purpose of which is almost exclusively to supply the person with various services for that testing activity?'

Case C-319/11

21 Widex, which has the seat of its economic activity in Denmark, has a research division in Stockholm.

22 It acquires goods and services for the research activity which it carries out in the division.

23 On the basis of the rules on refund to foreign economic operators, Widex applied to the Skatteverket for a refund of input VAT paid on its purchases. Its application covers the period from 1 January 2008 to 31 December 2008 and was made to the Skatteverket on 9 June 2009. The refund sought amounts to SEK 109 023. It relates to VAT on, inter alia, expenditure for rent, training and technical equipment.

24 The Skatteverket decided not to grant a refund on the ground that Widex has a fixed establishment in Sweden. It has not referred to the existence of supplies of goods or services made by that undertaking in Sweden.

25 Widex has appealed against the decision of the Skatteverket to the Förvaltningsrätten i Falun.

26 In support of its action Widex has submitted, in essence, that it manufactures hearing aids and that it has a centre in Sweden which carries out research into audiology. That centre constitutes a division within Widex. No sales, marketing or other service takes place from the premises in Stockholm other than pure research. The division's income is the amount it receives from the Widex head office in Denmark. Widex contributes the funds for the four employees' wages and social contributions directly from the head office in Denmark. Widex points out in addition that it is the tenant of the premises in Stockholm and that it also has a Swedish subsidiary company in Malmö which sells and distributes its goods in Sweden. However, the research division has nothing to do with that subsidiary company.

27 The Skatteverket contends that the appeal should be dismissed.

28 The Skatteverket argues that three conditions must be met for an establishment to be a fixed establishment. In its opinion, there must be staff resources and technical resources and at the same time the establishment in question must be so permanent that it has the potential to supply or acquire goods or services. It is not necessary for it actually to supply goods or services.

29 It submits that Widex made an application to be registered as an employer with effect from and including September 2006, that the activity is carried out in premises in Stockholm and that the purchases which are made for the activity appear to be made from it since a large part of the invoices are addressed to the premises in Stockholm. It deduces therefrom that Widex has a fixed establishment in Stockholm, since the activity has been carried out from the same place for a number of years and there are personnel and technical resources on the premises.

30 In those circumstances, the Förvaltningsrätten i Falun has decided to stay the proceedings and refer the following questions to the Court:

'1. How is the expression "fixed establishment from which business transactions are effected" to be interpreted in an assessment on the basis of the relevant provisions of EU law?

2. Is a taxable person who has the seat of his economic activity in another Member State and whose activity consists, inter alia, of the manufacture and sale of hearing aids to be regarded, by virtue of carrying out research into audiology from a research division in Sweden, as having had a fixed establishment in Sweden from which business transactions have been effected where that person has acquired goods and services that were received and used at the research division in question in Sweden?'

Consideration of the questions referred

The first and second questions in Cases C-318/11 and C-319/11

31 By its two first questions in each of the two cases C-318/11 and C-319/11, the national court asks, in essence, whether a taxable person for VAT established in one Member State and carrying out in another Member State only technical testing or research work, not including taxable transactions, can be regarded as having in that other Member State a 'fixed establishment from which business transactions are effected' within the meaning of Article 1 of the Eighth Directive and Article 3(a) of Directive 2008/9.

32 Such a criterion includes two cumulative conditions, requiring, firstly, the existence of a 'fixed establishment' and, secondly, that 'transactions' be carried out from that establishment.

33 The Skatteverket is of the opinion that the right to a refund of VAT is excluded where the applicant has a fixed establishment with a certain level of stability in the Member State of refund. In essence, it submits that Article 1 of the Eighth Directive and Article 3(a) of Directive 2008/9 do not require, moreover, that output taxable transactions be carried out by that establishment in the Member State of refund, in order to exclude the right to refund of the input VAT in that State in respect of purchases of goods or services carried out there.

34 In the submission of the Skatteverket, it follows from the case-law of the Court (Cases 168/84 *Berkholz* [1985] ECR 2251; C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395; C-190/95 *ARO Lease* [1997] ECR I-4383; C-260/95 *DFDS* [1997] ECR I-1005; C-390/96 *Lease Plan* [1998] ECR I-2553; and C-73/06 *Planzer Luxembourg* [2007] ECR I-5655) that a fixed establishment is an establishment so autonomous that goods or services could be put on the market from it. However, there is no requirement for the fixed establishment actually to supply goods or services.

35 In that regard, it must be noted that, in all the judgments referred to by the Skatteverket and listed in the previous paragraph of the present judgment, the Court has interpreted the concept of 'fixed establishment' or 'seat of economic activity' with regard to taxable transactions actually carried out, for the purposes of determination of their place of taxation. It has, in so doing, never ruled on the separate question of whether, for the purposes of exclusion from the right to refund of VAT, taxable transactions must have actually been carried out in the Member State of refund or whether the mere ability to carry out such transactions is sufficient.

36 With regard to the latter question, it must, however, be borne in mind that, in its judgment in Case C-244/08 *Commission* v *Italy* [2009] ECR I-130, paragraphs 31 and 32, the Court held that the expression 'fixed establishment from which business transactions are effected' in Article 1 of the Eighth Directive and, now, in Article 3(a) of Directive 2008/9, must be interpreted as regarding a non-resident taxable person as a person who does not have a fixed establishment carrying out taxable transactions in general. The existence of active transactions in the Member State concerned therefore constitutes the determining factor for exclusion of recourse to the Eighth Directive. Similarly, the Court has held that the term 'transactions' used in the phrase 'from which business transactions are effected' can affect only output transactions.

37 It follows that, for the purposes of exclusion of a right to refund, taxable transactions must actually be carried out by the fixed establishment in the State where the application for refund is made and a mere ability to carry out such transactions does not suffice.

38 In the main proceedings, it is not in dispute that the undertakings concerned do not carry out output taxable transactions in the Member State where the applications for refund have been

made through their technical testing and research departments.

39 In those circumstances, a right to refund of the input VAT paid must be granted, without it being necessary to examine, moreover, whether the undertakings in question do actually each have a ‘fixed establishment’ within the meaning of the provisions to be interpreted, since the two conditions forming the criterion of a ‘fixed establishment from which business transactions are effected’ are cumulative.

40 As the Commission points out, such an interpretation corresponds to the purpose of the applicable directives, which is to enable taxable persons to obtain refund of the input VAT where, in the absence of active taxable transactions in the Member State of refund, they could not deduct that input VAT paid from output VAT due.

41 The right of a taxable person established in a Member State to obtain refund of VAT paid in another Member State, in the manner governed by the Eighth Directive, is the counterpart of such a person’s right established by the VAT Directive to deduct input VAT in his own Member State (*Planzer Luxembourg*, paragraph 35).

42 Finally, it must be borne in mind that Article 1 of the Eighth Directive and Article 3(b) of Directive 2008/9 expressly make a right to refund of VAT subject to the absence of supply of goods or services deemed to have taken place in the Member State of refund, where a taxable person has not had in that Member State the seat of his economic activity or a fixed establishment from which business transactions were effected or, if no such seat or fixed establishment existed, his domicile or normal place of residence.

43 The actual carrying out of taxable transactions in the Member State of refund is thus the common requirement for there to be exclusion of a right to refund, whether or not the applicant taxable person has a fixed establishment in that State.

44 Consequently, the answer to the first two question in each of the cases is that a taxable person for VAT established in one Member State and carrying out in another Member State only technical testing or research work, not including taxable transactions, cannot be regarded as having in that other Member State a ‘fixed establishment from which business transactions are effected’ within the meaning of Article 1 of the Eighth Directive and Article 3(a) of Directive 2008/9.

The third question in Case C-318/11

45 By its third question in Case C-318/11, the national court asks, in essence, whether the interpretation given to the concept of ‘fixed establishment from which business transactions are effected’ is called into question, in a situation such as that in the main proceedings, by the fact that the taxable person has, in the Member State where it has applied for refund, a wholly-owned subsidiary, the purpose of which is almost exclusively to supply the person with various services in respect of its technical testing activity.

46 The Skatteverket submits that, in the main proceedings, the taxable person, through its wholly-owned subsidiary, has a fixed establishment in the Member State where it has applied for refund.

47 It argues that the Court has held, in paragraphs 26 to 29 of its judgment in *DFDS*, that a subsidiary which has technical and human resources and acts as a mere auxiliary of the parent company constitutes a fixed establishment of that company in the Member State where the subsidiary is situated.

48 In that regard, it is sufficient to note that a wholly-owned subsidiary such as that referred to by the national court is a taxable legal person on its own account and that the purchases of goods at issue in the main proceedings were not made by it.

49 Furthermore, it is appropriate to point out that, in the case which gave rise to the judgment in *DFDS*, the independence of the of status of the subsidiary was disregarded in favour of the commercial reality only to ascertain which of the parent company and the subsidiary had actually carried out the active taxable transactions of supplies of services in dispute in the main proceedings and, subsequently, which was the Member State of taxation for those transactions.

50 In Case C-318/11, the very condition that there be active output taxable transactions carried out by the technical testing department is not met, that condition being linked cumulatively to the concept of 'fixed establishment' and so of itself necessary if a right to refund is to be excluded.

51 Consequently, the answer to the third question in Case C-318/11 is that the interpretation given to the concept of 'fixed establishment from which business transactions are effected' is not called into question, in a situation such as that in the main proceedings, by the fact that the taxable person has, in the Member State where it has applied for refund, a wholly-owned subsidiary, the purpose of which is almost exclusively to supply the person with various services in respect of its technical testing activity.

Costs

52 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 (Eighth Chamber) hereby rules:

1. **A taxable person for VAT established in one Member State and carrying out in another Member State only technical testing or research work, not including taxable transactions, cannot be regarded as having in that other Member State a 'fixed establishment from which business transactions are effected' within the meaning of Article 1 of 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, as amended by Council Directive 2006/98/EC of 20 November 2006, and Article 3(a) of Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State.**

2. **The interpretation given to the concept of 'fixed establishment from which business transactions are effected' is not called into question, in a situation such as that in the main proceedings, by the fact that the taxable person has, in the Member State where it has applied for refund, a wholly-owned subsidiary, the purpose of which is almost exclusively to supply the person with various services in respect of its technical testing activity.**

[Signatures]

* Language of the case: Swedish.