JUDGMENT OF THE COURT (Seventh Chamber)

6 March 2014 (*)

(Request for a preliminary ruling – Taxation – VAT – Directive 2006/112/EC – Article 17(2)(f) – Condition relating to the return of goods to the Member State from which they were initially dispatched or transported)

In Joined Cases C?606/12 and C?607/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Commissione tributaria provinciale di Genova (Italy), made by decision of 30 October 2012, received at the Court on 24 December 2012, in the proceedings

Dresser-Rand SA

v

Agenzia delle Entrate, Direzione Provinciale, Ufficio Controlli di Genova,

THE COURT (Seventh Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, G. Arestis and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Dresser-Rand SA, by P. Centore, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and A. De Stefano, avvocato dello Stato,

– the European Commission, by D. Recchia and C. Soulay, acting as Agents,

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 17(2)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (‘the VAT Directive’).

2 The requests have been made in proceedings between Dresser-Rand SA (‘Dresser-Rand France’), a company governed by French law, and the Agenzia delle Entrate, Direzione

Provinciale, Ufficio Controlli di Genova, (Genoa office of the provincial administration of the Revenue Authority) concerning notices of recovery reassessing unpaid value added tax (VAT) for the tax years 2007 and 2008.

Legal context

European Union law

3 Article 14 of the VAT Directive states:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

…

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.

…’

4 Article 17 of the directive is worded as follows:

‘1. The transfer by a taxable person of goods forming part of his business assets to another Member State shall be treated as a supply of goods for consideration.

“Transfer to another Member State” shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable person, for the purposes of his business, to a destination outside the territory of the Member State in which the property is located, but within the Community.

2. The dispatch or transport of goods for the purposes of any of the following transactions shall not be regarded as a transfer to another Member State:

…

(f) the supply of a service performed for the taxable person and consisting of work on the goods in question physically carried out within the territory of the Member State in which dispatch or transport of the goods ends, provided that the goods, after being worked upon, are returned to that taxable person in the Member State from which they were initially dispatched or transported;

…

3. If one of the conditions governing eligibility under paragraph 2 is no longer met, the goods shall be regarded as having been transferred to another Member State. In such cases, the transfer shall be deemed to take place at the time when that condition ceases to be met.’

5 Article 20 of that directive provides:

‘“Intra-Community acquisition of goods” shall mean the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.

Where goods acquired by a non-taxable legal person are dispatched or transported from a third territory or a third country and imported by that non-taxable legal person into a Member State other than the Member State in which dispatch or transport of the goods ends, the goods shall be regarded as having been dispatched or transported from the Member State of importation. That Member State shall grant the importer designated or recognised under Article 201 as liable for payment of VAT a refund of the VAT paid in respect of the importation of the goods, provided that the importer establishes that VAT has been applied to his acquisition in the Member State in which dispatch or transport of the goods ends.’

6 Article 21 of the directive treats as an intra-Community acquisition of goods for consideration ‘the application by a taxable person, for the purposes of his business, of goods dispatched or transported by or on behalf of that taxable person from another Member State, within which the goods were produced, extracted, processed, purchased or acquired within the meaning of Article 2(1)(b), or into which they were imported by that taxable person for the purposes of his business’.

Italian law

7 Under the heading ‘Intra-Community acquisitions’, Article 38 of Decree-Law No 331 of 30 August 1993 harmonising tax provisions in various fields (GURI No 203, 30 August 1993, p. 12), provides:

‘1. [VAT] is payable on intra-Community acquisitions of goods within the territory of the State as part of the operation of an undertaking or the exercise of a trade or profession or, in any event, by legal persons, associations or other organisations referred to in the fourth paragraph of Article 4 of Decree No 633 of the President of the Republic of 26 October 1972 [(ordinary supplement to GURI, No 292, 11 November 1972) (‘Decree No 633’)] who are liable for payment of VAT within the territory of the State.

2. The acquisition, for consideration, of title to goods or any other real property right entitling the acquirer to enjoy the goods, dispatched or transported to the territory of the State from another Member State either by the supplier, as a person liable for payment of VAT, or by the acquirer, or by a third party acting on their behalf shall be considered an intra-Community acquisition.

3. Furthermore, the following shall be considered intra-Community acquisitions:

…

(b) the introduction into the territory of the State, by or on behalf of a person liable for payment of VAT, of goods from another Member State. The present provision also applies in the case of the dispatch or transport to the territory of the State, for the purpose of the operation of an undertaking, of goods from another undertaking whose activities are conducted by the same person in another Member State;

(c) the acquisitions referred to in paragraph 2 by legal persons, associations and other organisations referred to in the fourth paragraph of Article 4 of [Decree No. 633], who are not liable for payment of VAT;

(d) the introduction into the territory of the State, by or on behalf of the persons mentioned in

point (c), of goods previously imported by them from another Member State;

…

5. The following shall not be considered intra-Community acquisitions:

(a) the introduction into the territory of the State of goods subject to processing operations or usual forms of handling as defined, respectively, in Article 1(3)(h) of Council Regulation [(EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1)] and Article 18 of Council Regulation [(EEC) No 2503/88 of 25 July 1988 on customs warehouses (OJ 1988 L 225, p. 1)], if the goods are subsequently transported or dispatched to the acquirer, who is liable for payment of VAT, in the Member State of origin or on his behalf in another Member State, or outside the territory of the Community; the introduction into the territory of the State of goods used temporarily for the supply of services or which, if imported, would benefit from temporary importation arrangements with total exemption from import duty;

…

7. The tax shall not be payable in the event of an intra-Community acquisition in the territory of the State, by a taxable person in another Member State, of goods acquired by that taxable person in another Member State, subsequently dispatched or transported in the territory of the State to that taxable person's own assignees liable for payment of VAT, or to legal persons referred to in the fourth paragraph of Article 4 of [Decree No. 633] liable for payment of VAT on intra-Community acquisitions, designated as liable for payment of the tax relating to the supply.

8. Intra-Community acquisitions made by agents without representation shall be considered as having been made in person.'

8 Article 8 of Decree No 633, entitled 'Export supplies', provides:

'The following shall be considered as non-taxable export supplies:

(a) supplies, including through agents, of goods transported or dispatched outside the territory of the European Economic Community by or on behalf of suppliers or agents, including on the instructions of their own assignees or agents. The goods may be subjected, on behalf of the assignee and by the supplier himself or by third parties, to contract work, processing, assembly, or adaptation to other goods. …

(b) supplies which include transport or dispatch outside the territory of the European Economic Community within ninety days from the delivery of goods, by the non-resident assignee or on his behalf, with the exception of goods intended for equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use, and goods to be carried in personal luggage outside of the territory of the European Economic Community; the export shall be certified by a stamp affixed by the customs or post office to a copy of the invoice;

(c) supplies, including through agents, of goods other than buildings and building plots and of services provided to individuals who, having made export supplies or intra-Community transactions, exercise the right to acquire, including through agents, or import goods and services without paying VAT.

Supplies referred to in point (c) above are made without payment of VAT to the persons referred to in point (a), if they are residents, and to the persons carrying out the supplies referred to in point (b) of the preceding paragraph on the basis of their written declaration and under their responsibility, up to the total amount of the supplies referred to in the above points made by those

persons during the previous calendar year. Assignees and agents may make full use of that amount for the acquisition of goods which are exported in their original condition within the six months following their delivery and, up to the amount of the difference between that amount and the amount of supplies of goods made to them during that year in accordance with point (a), for the acquisition of other goods or services. …'

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

9 Dresser-Rand France manufactures industrial natural gas compressors.

10 In the course of that activity, Dresser-Rand France concluded a contract with an end customer, a Spanish undertaking, for the supply of complex goods. Dresser-Rand France used, in order to complete the order, compressors imported from its factories in China by Dresser-Rand Italia Srl ('Dresser-Rand Italy').

11 Dresser-Rand France brought from France to Italy certain components which are necessary for the use of the imported compressors. It then concluded with FB ITMI SpA ('FB ITMI'), a subcontractor established in Italy, a contract for the supply of further components required for the installation and operation of the relevant goods at the premises of the end customer. Finally, FB ITMI directly dispatched the assembled goods to the end customer in the name of and on behalf of Dresser-Rand Italy, acting as tax representative of Dresser-Rand France.

12 FB ITMI invoiced Dresser-Rand Italy for the operations relating to the supply of the related assembly and adaptation services and of the goods at issue. Dresser-Rand Italy, acting as tax representative of Dresser-Rand France, proceeded to invoice the complete set of goods sent to the end customer.

13 Relying on its classification as an exporter making frequent shipments, Dresser-Rand Italy, acting as tax representative of Dresser-Rand France, took the view, pursuant to Article 8(1)(c) and (2) of Decree No 633, that it could acquire the goods and services supplied by FB ITMI without having to pay VAT, which the revenue authority disputes. As the classification as exporter making frequent shipments depends on the classification of the transfers of goods made from France to Italy, the disagreement between the parties in the main proceedings relates to that classification.

14 Dresser-Rand France takes the view that the transfer of compressors from France to Italy is 'an assimilated intra-Community acquisition, on the basis of Article 17(1) of the [VAT] Directive'. It also submits that the sale of assembled goods to the end customer, from Italy, gives rise to an intra-Community supply.

15 The Agenzia delle Entrate, Direzione Provinciale, Ufficio Controlli di Genova, submits that the transfer of goods from France to Italy is governed by Article 17(2)(f) of that directive and, accordingly, is subject to the suspension arrangement provided for under point (a) of the fifth subparagraph of Article 38 of Decree-Law No 331 of 30 August 1993 harmonising tax provisions in various fields. The Agenzia submits that the purpose of the contract concluded between Dresser-Rand France and FB ITMI is not the supply of new goods, but of a service. As a consequence, the transaction which is the subject of the contract cannot be assimilated to a supply of goods, within the meaning of Article 17(1) of that directive.

16 Dresser-Rand France disputes the application of the suspension arrangement in the case in the main proceedings, on the grounds, first, that FB ITMI's activity consists essentially of producing and supplying goods and, secondly, that the goods brought onto Italian territory are not returned to the Member State of origin, contrary to what the VAT Directive provides for the application of such an arrangement.

17 In those circumstances, the Commissione tributaria provinciale di Genova (Provincial Tax Court, Genoa, Italy) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling, which are drafted in identical terms in Cases C?606/12 and C?607/12:

'(1) Does the transfer of goods to Italy from another Member State for the purpose of verifying whether those goods may be adapted to other goods acquired within Italy, without anything being done to the goods brought into Italy, come within the definition of "work on the goods" referred to in Article 17(2)(f) of [the VAT Directive] and, in that connection, is it appropriate to assess the nature of the transactions which took place between FB ITMI and [Dresser-Rand Italy]?

(2) Is Article 17(2)(f) of [the VAT Directive] to be interpreted as precluding Member States from providing in their legislation or practice that the dispatch or transport of goods is not to be treated as a transfer to another Member State except on condition that the goods are returned to the Member State from which they were initially dispatched or transported?'

18 By order of the President of the Court of 28 January 2013, Cases C?606/12 and C?607/12 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

Preliminary observations

19 It appears both from the orders for reference and from the parties' comments that there may be confusion between the concept of 'supply of goods', defined in Article 14 of the VAT Directive, and that of 'intra-Community acquisition', defined in Article 20 of that directive.

20 As attested by paragraph 14 above, reference is made on several occasions to the concept of 'intra-Community acquisition' in connection with Article 17(1) of that directive, whereas that concept is the subject of Article 21 of the directive.

21 Article 17(1) of the VAT Directive treats certain transfers of goods as intra-Community supplies and in no way relates to intra-Community acquisitions.

22 Accordingly, it must be considered that the present references relate not to the concept of 'intra-Community acquisitions', but to the concept of 'transfers of goods', within the meaning of Article 17 of the VAT directive.

The second question

23 By its second question, which should be considered first, the referring court asks whether Article 17(2)(f) of the VAT Directive should be interpreted as meaning that, except in the event that the goods in question are returned to the Member State from which they were initially dispatched or transported, it is not possible for the legislation or practice of a Member State to decline to treat the dispatch or transport of goods to another Member State as a transfer to that Member State.

24 It is appropriate, first, to refer to the wording of Article 17(2)(f) of the VAT Directive, which

expressly provides that the dispatch of goods for the purpose of supplying a service performed for the taxable person is not to be regarded as a transfer to another Member State, provided that the goods are afterwards returned to that taxable person in the Member State of origin, that is, the Member State from which they were initially dispatched.

25 The application of Article 17(2)(f) of the directive is thus expressly subject to the condition that the goods are returned to the Member State of origin.

26 Next, it should be stated that Article 17(2) of the VAT Directive lists a number of situations, including that in indent (f), which do not fall under the classification of 'transfer to another Member State' laid down in Article 17(1) of the directive.

27 It thus follows from the structure and wording of Article 17 of the VAT Directive that Article 17(2) contains an exhaustive list of derogations, which, accordingly, must be interpreted strictly (see, by analogy, Case C?169/12 *TNT Express Worldwide* [2013] ECR, paragraph 24 and the case-law cited).

28 Finally, it should be recalled that the purpose of the transitional arrangements relating to VAT applicable to intra-Community trade established by the directive is to transfer the tax revenue to the Member State in which final consumption of the goods supplied takes place (see, inter alia, Joined Cases C?536/08 and C?539/08 *X and Fiscale eenheid Facet-Facet Trading* [2010] ECR I?3581, paragraph 30, and Case C?84/09 *X* [2010] ECR I?11645, paragraphs 22 and 31). Thus, the derogation in Article 17(2)(f) of the directive must be interpreted, in particular, in the light of that objective.

29 Pursuant to the principle of taxation in the Member State of destination set out in the preceding paragraph, Article 17(2)(f) of the VAT Directive must therefore be interpreted as permitting the transfer of goods to another Member State not to be classified as an intra-Community supply only in so far as the goods remain temporarily in that Member State and are intended to be returned later to the Member State of origin.

30 It is only where the transfer of goods to another Member State is carried out not for the purpose of final consumption of the goods in that Member State, but for the purpose of the processing of those goods followed by their return to the Member State of origin, that such a transfer is not to be classified as an intra-Community supply.

31 Having regard to the foregoing, the return of the goods to the taxable person in the Member State from which the goods were initially dispatched or transported must be considered a necessary condition for the application of Article 17(2)(f) of the VAT Directive.

32 Accordingly, the answer to the second question is that Article 17(2)(f) of the VAT Directive must be interpreted as meaning that, in order for the dispatch or transport of goods not to be classified as a transfer to another Member State, those goods, after the work on them has been carried out in the Member State in which dispatch or transport of the goods ends, must necessarily be returned to the taxable person in the Member State from which they were initially dispatched or transported.

The first question

33 By its first question, the referring court asks, in essence, whether Article 17(2)(f) of the VAT Directive must be interpreted as meaning that the verification of whether goods transferred from one Member State to another Member State may be adapted to other goods acquired on the territory of the second Member State, without anything being done to the transferred goods, comes

within the concept of ‘work on the goods’ within the meaning of that provision.

34 It must be recalled that, pursuant to the allocation of judicial functions between national courts and the Court of Justice under Article 267 TFEU, while the Court gives a preliminary ruling without, generally, having to look into the circumstances in which national courts were prompted to submit the questions and envisage applying the provision of European Union law which they have asked the Court to interpret, the position is different, however, in a case, in particular, where it is obvious that the provision of European Union law referred to the Court for interpretation is incapable of applying (see, to that effect, Joined Cases C?297/88 and C?197/89 *Dzodzi* [1990] ECR I?3763, paragraphs 39 and 40, and Case C?64/06 *Telefónica 02 Czech Republic* [2007] ECR I?4887, paragraphs 22 and 23).

35 As has been noted in paragraph 32 above, the return of the goods to the taxable person in the Member State from which they were initially dispatched or transported is a necessary condition for the application of Article 17(2)(f) of the VAT Directive.

36 However, according to the orders for reference, in the cases in the main proceedings the goods at issue were not returned to the Member State of origin, namely the French Republic, after the work was done on them in Italy.

37 As the condition relating to the return of the goods to the Member State of origin has not been met, Article 17(2)(f) of the VAT Directive is not applicable to the cases in the main proceedings.

38 There is therefore no need to answer the first question.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Seventh Chamber) hereby rules:

Article 17(2)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in order for the dispatch or transport of goods not to be classified as a transfer to another Member State, those goods, after the work on them has been carried out in the Member State in which dispatch or transport of the goods ends, must necessarily be returned to the taxable person in the Member State from which they were initially dispatched or transported.

[Signatures]

* Language of the case: Italian.