JUDGMENT OF THE COURT (Eighth Chamber)

30 April 2015 (*)

(Reference for a preliminary ruling — Common system of value added tax —Directive 2006/112/EC — Articles 52(c) and 55 — Determination of the place of supply of services — Recipient of the service identified for value added tax purposes in several Member States — Dispatch or transport out of the Member State in which the service has been physically carried out)

In Case C?97/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gyulai Közigazgatási és Munkaügyi Bíróság (Hungary), made by decision of 17 February 2014, received at the Court on 3 March 2014, in the proceedings

SMK kft

v

Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó F?igazgatósága,

Nemzeti Adó- és Vámhivatal,

THE COURT (Eighth Chamber),

composed of A. Ó Caoimh, President of the Chamber, C. Toader and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Hungarian Government, by G. Koós and Z. Fehér, acting as Agents,

– the Greek Government, by K. Paraskevopoulou and I. Kotsoni, acting as Agents,

– the European Commission, by V. Bottka and L. Lozano Palacios, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 52(c) and 55 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 request has been made in proceedings between SMK kft, a company established in Hungary, and Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó F?igazgatósága (Dél-Alföld Regional Tax Directorate of the National Tax and Customs Administration, ‘the F?igazgatóság’) and Nemzeti Adó- és Vámhivatal (National Tax and Customs Administration, ‘the NAV’) concerning a decision subjecting SMK kft to payment of value added tax (VAT) for 2007 to 2009 and January to March 2010.

Legal context

EU law

3 Although the dispute in the main proceedings relates in part to the period from January to March 2010, which is governed by the VAT Directive as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11), it is clear from the order for reference that the referring court is asking only about the interpretation of Articles 52(c) and 55 of the VAT Directive in the version in force until 1 January 2010, before the amendments made by Directive 2008/8.

4 In accordance with Article 52 of the VAT Directive, which is in Title V of the directive, on the place of taxable transactions:

‘The place of supply of the following services shall be the place where the services are physically carried out:

…

(c) valuations of movable tangible property or work on such property.’

5 Article 55 of the VAT Directive reads as follows:

‘By way of derogation from Article 52(c), the place of supply of services involving the valuation of movable tangible property or work on such property, supplied to customers identified for VAT purposes in a Member State other than that in the territory of which the services are physically carried out, shall be deemed to be within the territory of the Member State which issued the customer with the VAT identification number under which the service was rendered to him.

The derogation referred to in the first paragraph shall apply only where the goods are dispatched or transported out of the Member State in which the services were physically carried out.’

Hungarian law

6 Article 15(4) of Law LXXIV of 1992 on value added tax (az általános forgalmi adóról szóló 1992. évi LXXIV. törvény), as in force in 2007, (‘the VAT Law’) provided:

‘The place where the supply of the following services is physically carried out shall be regarded as the place of performance:

…

(c) assembly, repair, maintenance, renewal, conversion or finishing of goods (except immovable property).

…’

7 In accordance with Article 15/A(12) to (14) of the VAT Law:

‘12. If the recipient of the services specified in Article 15(4)(c) and (d) is a taxable person registered in a Member State other than that in which the services are physically carried out, the place of performance shall be deemed to be the territory of the Member State in which the recipient of the services is registered as a taxable person.

13. Paragraph 12 shall not apply where the goods have not been transported out of the Member State in which the service was physically carried out.

14. Where the place of performance is determined by the territory of the Member State in which the person or entity receiving in his own name services defined in this article is registered, and the person or entity receiving the services is registered as a taxable person in several Member States at the same time, the place of performance shall be the Member State whose tax authorities have issued a tax number to that person or entity in receipt of the service defined in this article. The taxable person is required to accept the service under the number issued by the Member State in which he carries on the activity which renders him liable to tax and in the interests of which the service defined in this article is performed.’

8 Article 42(1) of Law CXXVII of 2007 on value added tax, in force from 1 January 2008, (‘the new VAT Law’) provides:

‘In the case of the following supplies of services, the place of performance shall be the place where the service is physically carried out:

…

(d) work on goods (except immovable property).’

9 In accordance with Article 45(1) and (2) of the new VAT Law:

‘1. By way of exception to Article 42, if the recipient of a service referred to in Article 42(1)(c) and (d) is a taxable person registered in another Member State of the Community, different from that in which the service is physically performed, the place of performance of the service shall be the Member State of the Community in which the recipient of the service has been registered as a taxable person.

2. Paragraph 1 applies where the goods resulting from a service referred to in Article 42(1)(c) and (d) are dispatched or transported out of the Member State of the Community in which the service referred to in Article 42(1)(c) and (d) has been physically performed.’

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

10 As may be seen from the order for reference, SMK kft, a member of the SMK group of companies, is liable for VAT in Hungary and accordingly has a VAT identification number in Hungary. The group of companies also includes SMK UK Ltd, a company established in the United Kingdom which, until 30 July 2007, was registered for VAT both in the United Kingdom and in Hungary and had British and Hungarian VAT identification numbers. SMK Europe NV (‘SMK Europe’), a company established in Belgium and registered for VAT in Hungary, is also a member of the group and is responsible for marketing the group’s products in Europe.

11 From March 2002 SMK kft provided services in Hungary as a subcontractor to SMK UK Ltd. SMK UK Ltd purchased the raw materials and parts necessary for assembly of the finished

products, which were remote controls for electronic apparatus. The machinery, equipment and tools were the property of SMK UK Ltd. SMK kft did not have its own stocks of raw materials or finished products, and confined itself to assembly of the remote controls.

12 After assembly, the finished products remained on the premises of SMK kft, while the recipient of the services, SMK UK Ltd, sold them to SMK Europe, which then sold them on to purchasers established in another Member State or a non-member country. SMK kft was entrusted by SMK UK Ltd with the delivery of the products to the purchasers. The invoices drawn up for those sales, which functioned as transport documents, were issued by SMK UK Ltd in the name of the purchaser of the finished products, SMK Europe, but the products were sent directly to the end purchasers within the European Union or in non-member countries to whom SMK Europe had resold the products. In all cases the finished products left Hungarian territory and were never transported to the United Kingdom.

13 SMK kft, as consideration for the services provided, invoiced the manufacturing price of the finished products to SMK UK Ltd without tax and with the words ‘outside the territorial scope of VAT’. In the invoices it mentioned the British VAT identification number of SMK UK Ltd.

14 The Inspection Department for large taxpayers of the Békés Provincial Tax Directorate of the National Tax and Customs Administration (‘the first-tier tax authority’) carried out an investigation of the VAT returns made by SMK kft for the period from 1 January to 31 December 2007.

15 Following that investigation, the first-tier tax authority found that the place of supply of the contractual services in question was the place where the services were physically carried out, namely Hungary. More precisely, it found that SMK kft had not shown that the finished products had been dispatched out of Hungary, so that it was not possible to regard the United Kingdom as the place of supply of services. The tax authority therefore found that there was a tax debt of 27 712 000 Hungarian forints (HUF) and ordered SMK kft to pay it.

16 SMK kft contested the first-tier tax authority’s decision before the F?igazgatóság, arguing that the conditions laid down by Article 15/A(12) and (13) of the VAT Law were satisfied, so that the contractual services at issue in the main proceedings could be invoiced without VAT as legal transactions outside the territorial scope of the VAT Law. It submitted that there was no obligation to transport the finished products to the Member State of the recipient of the services.

17 By its decision of 10 December 2012, the F?igazgatóság as second-tier tax authority confirmed the decision of the first-tier tax authority. It found that the finished products had been sold by SMK UK Ltd to SMK Europe before being transported, while they were still in Hungarian territory. In those circumstances, it considered that the transport of those goods was a consequence of their sale, not of the supply of contractual services.

18 In addition, the first-tier tax authority investigated the VAT and corporation tax returns for 2008 and 2009 and January to March 2010. During that period SMK kft likewise performed contractual services for SMK UK Ltd, for which it did not invoice VAT.

19 Following a review of that investigation, the Director General of the F?igazgatóság found that SMK kft owed a tax debt of HUF 107 616 000 and imposed a tax fine of HUF 21 523 000 and a penalty for delay of HUF 38 208 000. It considered that, pursuant to Articles 42(1)(b) and 45 of the new VAT Law, the place of performance of the contractual services supplied by that company during that period was situated in Hungary.

20 SMK kft contested the first-tier tax authority’s decision before the NAV, which, by decision of

8 January 2013, confirmed that decision, taking the view that the place of performance of the contractual services was in Hungary.

21 SMK kft brought administrative law proceedings against the decision of the F?igazgatóság of 10 December 2012 and the decision of the NAV of 8 January 2013 before the referring court. As regards, first, the decision of the F?igazgatóság, SMK kft submitted in particular that, for determining the place of performance of the services consisting of work carried out on goods, Article 55 of the VAT Directive does not require those goods to be delivered in the Member State of the recipient of the services. In its view it suffices that they have been transported or dispatched out of the Member State in which their manufacture has been completed.

22 SMK kft stressed that, after it had supplied the services, the finished products, which were sold to purchasers in Member States other than Hungary, necessarily left Hungarian territory. The fact that the recipient of the services, SMK UK Ltd, was also registered in the Hungarian VAT register in 2007 did not mean that it received the services under a Hungarian VAT identification number, since its principal activity was linked to an establishment in another Member State. SMK kft considered that Article 15/A(14) of the VAT Law was contrary to the VAT Directive.

23 The F?igazgatóság argued that SMK kft had been required to account for the services under its Hungarian VAT identification number, as the sales of the finished products resulting from the work done by SMK kft had taken place in Hungary. It followed, in its view, that the place of supply of the services was deemed to be within Hungarian territory, and the supplies were not therefore outside the territorial scope of the VAT Law. The transport of the finished products had no effect on the fact that, once the services had been carried out, SMK kft was liable to pay VAT.

24 As regards, secondly, the decision of the NAV of 8 January 2013, SMK kft argued that the obligation to pay VAT could not be deduced from the VAT Directive without adopting an interpretation contrary to the directive. It was for the recipient of the services to decide who should bear the tax obligation. Finally, the refusal to apply the fiscal exception to the services in question breached the principles of the territoriality and neutrality of VAT.

25 The NAV argued that, in order to apply the exception laid down in Article 55 of the VAT Directive, it had to be examined whether the recipient of the contractual services had or should have had a VAT identification number in Hungary. It stated in this respect that the finished products assembled by SMK kft were not dispatched to the Member State in whose territory SMK UK Ltd is established, but were sold in Hungary, so that Hungary was to be regarded as the place where the sale by SMK UK Ltd took place.

26 In those circumstances, the Gyulai Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Gyula) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. May Article 55 of the VAT Directive in force until 1 January 2010 be interpreted as referring only to those taxable persons receiving a supply of services who do not have, or are not required to have, an identification number for VAT purposes in the Member State of the place where the services are physically carried out?

2. If the first question is answered in the affirmative, is Article 52 of the VAT Directive exclusively applicable for determination of the place of supply of the services?

3. If the first question is answered in the negative, must Article 55 of the VAT Directive in force until 1 January 2010 be interpreted as meaning that, when the taxable person receiving the services covered by a contract has, or ought to have, a VAT identification number in more than

one Member State, the decision of that recipient of the services exclusively determines the fiscal identification number under which he receives the supply of services (including cases in which the taxable person receiving the supply is deemed to be established in the Member State of the place of physical performance of the services, but also has a VAT identification number in another Member State)?

4. If the answer to the third question should be that the right to decide of the recipient of the supply of services is unlimited, must Article 55 of the VAT Directive be interpreted as meaning that:

– until 31 December 2009, it may be considered that the supply of services was performed under the VAT identification number indicated by the recipient of that supply, if the recipient also has the status of taxable person registered (established) in another Member State and the goods are dispatched or transported out of the Member State in which the supply has been physically carried out?

– the determination of the place of performance of the services is influenced by the fact that the recipient of the supply is a taxable person established in another Member State who delivers the finished goods by dispatching or transporting them out of the Member State in which the services have been supplied to an intermediate purchaser, who in turn resells the goods in a third Member State without the recipient of the contractual services transporting the goods back to his establishment?

5. If the recipient of the supply of services does not have an unlimited right to decide, do the following factors influence the applicability of Article 55 of the VAT Directive, in force until 1 January 2010:

– the circumstances in which the recipient of certain works carried out on goods acquires the appropriate raw materials and places them at the disposal of the person carrying them out;

– the Member State from which and the fiscal identification number under which the taxable person receiving the services effects delivery of the finished goods resulting from such works;

– the fact that — as occurs in the main proceedings — the finished goods resulting from such works are the subject of various deliveries as part of a chain of operations, still within the country in which the works are carried out, and that they are transported directly from that country to the final purchaser?'

Consideration of the questions referred

27 As a preliminary point, it should be recalled that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court of Justice may have to reformulate the questions referred to it (see judgment in *Douane Advies Bureau Rietveld*, C?541/13, EU:C:2014:2270, paragraph 18 and the case-law cited).

28 It appears from the order for reference that the issue in the main proceedings is the determination for VAT purposes of the place of supply of the contractual services performed in Hungary by the applicant in the main proceedings on behalf of SMK UK Ltd, established in the United Kingdom, the owner of the goods to which those services related. It further appears from the materials put before the Court that the services in question consisted in the assembly of remote controls belonging to SMK UK Ltd by the applicant in the main proceedings. After

assembly the finished products remained in Hungary. SMK UK Ltd then sold them to SMK Europe, which resold them to purchasers established in another Member State or in a non-member country. It was thus only after being resold that the finished products were transported or dispatched out of Hungary.

29 It should also be noted that the referring court distinguishes between the period in which the recipient of the services was identified for VAT purposes both in Hungary and in the United Kingdom and the period in which the recipient no longer had a VAT identification number in Hungary.

30 Accordingly, the referring court's five questions, which should be addressed together, must be regarded as relating in substance to the question whether Article 55 of the VAT Directive, in the version in force until 1 January 2010, must be interpreted as applying in circumstances such as those at issue in the main proceedings, in which the recipient of the services was identified for VAT purposes both in the Member State in which the services were physically carried out and in another Member State, and later only in that other Member State, and the movable tangible property to which those services related was dispatched or transported out of the Member State in which the services were physically carried out not following the supplies of services but following the later sale of the goods.

31 The VAT Directive, which replaced 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), includes Title V dealing with the place of taxable transactions. In that title, Chapter 3 relates to the place of supply of services, and Sections 1 and 2 of Chapter 3 lay down the general rules for determining the place of taxation of those supplies and particular provisions relating to specific supplies of services. Like Article 9(2) and (3) of the Sixth Directive 77/388, Articles 44 to 59 of the VAT Directive contain rules which determine the specific places of reference for tax purposes (see judgment in *Welmory*, C?605/12, EU:C:2014:2298, paragraphs 37 and 38).

32 In accordance with well-established case-law of the Court, the object of the provisions determining the point of reference for tax purposes of supplies of services is to avoid, first, conflicts of jurisdiction which may result in double taxation and, secondly, non-taxation (judgment in *Welmory*, C?605/12, EU:C:2014:2298, paragraph 42 and the case-law cited).

33 Thus a provision such as Article 55 of the VAT Directive determines the point of reference for tax purposes of a supply of services and delimits the competences of the Member States. For that purpose, it aims to create a rational delimitation of the respective areas covered by national rules on VAT by determining in a uniform manner the point of reference for tax purposes of supplies of services (see, to that effect, judgment in *Welmory*, C?605/12, EU:C:2014:2298, paragraphs 50 and 51).

34 It should be noted that the general rule for determining the point of reference for tax purposes of supplies of services involving work on movable tangible property is laid down in Article 52(c) of the VAT Directive, according to which the place of supply of such services is the place where they are physically carried out.

35 Article 55 of the VAT Directive provides that, by way of derogation from that rule, the place of supply of the above services, supplied to customers identified for VAT purposes in a Member State other than that in the territory of which the services are physically carried out, is to be deemed to be within the territory of the Member State which issued the customer with the VAT identification number under which the service was rendered to him. The derogation is to apply only where the goods are dispatched or transported out of the Member State in which the services

were physically carried out.

36 It is thus apparent from the wording of Article 55 of the VAT Directive that the derogation provided for in that article applies where two cumulative conditions are satisfied. First, the recipient of the services must be ‘identified for VAT purposes’ in a Member State other than that in the territory of which the services are physically carried out, and, secondly, the goods must be dispatched or transported out of the Member State in which the services were physically carried out.

37 Since the place of supply of services must be determined by reference solely to the facts of the taxable transaction concerned, the second condition laid down in Article 55 of the VAT Directive for the application of the derogation for which it provides must be assessed in relation to those facts alone and not by reference to any subsequent transactions.

38 Consequently, for Article 55 of the VAT Directive to be applicable, the transport or dispatch of the goods must take place within the framework of the transaction relating to the work on those goods, before any other transaction subject to VAT takes place concerning those goods.

39 In the present case, as appears from the documents before the Court and as stated in paragraph 28 above, after assembly the finished products at issue in the main proceedings remained in Hungary and were transported out of Hungary only after the transactions consisting in their sale and resale.

40 It follows that, within the framework of the supplies of services at issue in the main proceedings, the goods were not transported or dispatched out of the Member State in which the services were physically carried out. The condition of transport or dispatch laid down in Article 55 of the VAT Directive was not therefore satisfied. Consequently, the point of reference for tax purposes of those supplies must be determined in accordance with Article 52(c) of the directive, under which that point of reference is in the Member State in which the services are physically carried out, in this case Hungary.

41 It should, moreover, be stated that, as regards the first condition for the application of Article 55 of the VAT Directive, the fact that during the period in which the services at issue were supplied the recipient of the services was identified for VAT purposes both in Hungary and in the United Kingdom, and later in the United Kingdom alone, has no effect on the outcome of the dispute before the referring court, since, within the framework of those supplies of services, the goods were not transported or dispatched out of Hungary.

42 In the light of all the foregoing, the answer to the questions referred for a preliminary ruling is that Article 55 of the VAT Directive, in the version in force until 1 January 2010, must be interpreted as not applying in circumstances such as those at issue in the main proceedings in which the recipient of the supplies of services was identified for VAT purposes both in the Member State in which the services were physically carried out and in another Member State, and later only in the other Member State, and the tangible movable property to which those services related was dispatched or transported out of the Member State in which the services were physically carried out not following the supplies of services but following the later sale of the goods.

Costs

43 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:

Article 55 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in the version in force until 1 January 2010, must be interpreted as not applying in circumstances such as those at issue in the main proceedings in which the recipient of the supplies of services was identified for VAT purposes both in the Member State in which the services were physically carried out and in another Member State, and later only in the other Member State, and the tangible movable property to which those services related was dispatched or transported out of the Member State in which the services were physically carried out not following the supplies of services but following the later sale of the goods.

[Signatures]

* Language of the case: Hungarian.