Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

21 September 2017 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Eighth Directive 79/1072/EEC — Directive 2006/112/EC — Taxable person residing in another Member State — Refund of VAT charged on imported goods — Conditions — Objective elements confirming the intention of the taxable person to use the imported goods in the course of his economic activities — Serious risk of non-completion of the transaction that justified the importation)

In Case C?441/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice, Romania), made by decision of 22 June 2016, received at the Court on 8 August 2016, in the proceedings

SMS group GmbH

v

Direc?ia General? Regional? a Finan?elor Publice Bucure?ti,

THE COURT (Tenth Chamber),

composed of M. Berger (Rapporteur), President of the Chamber, E. Levits and F. Biltgen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– SMS group GmbH, by E. B?ncil?, avocat,

– the Romanian Government, by R.-H. Radu, C.-M. Florescu and R.-M. Mangu, acting as Agents,

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

– the European Commission, by L. Lozano Palacios and L. Radu Bouyon, acting as Agents,

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

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Articles 2 to 6 of the 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; 'the Eighth Directive'), and of Article 17(2) and (3)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, 'the Sixth Directive').

2 This request has been made in proceedings between SMS group GmbH and the Direc?ia General? Regional? a Finan?elor Publice Bucure?ti (Regional Directorate-General of Public Finance, Bucharest, Romania) ('the tax authority') relating to the refund of value added tax (VAT) paid by SMS group in Romania in 2009.

Legal context

EU law

3 The case in the main proceedings concerns an application for a refund of VAT filed on 23 December 2009, following an importation of goods on 14 September 2009. Consequently, the Eighth Directive and 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') are applicable to the present case *ratione temporis.*

The Eighth Directive

4 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, during the period referred to in the first and second sentences of the first subparagraph of Article 7(1), has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected … and who, during the same period, has supplied no goods or services deemed to have been supplied in that country, with the exception of:

(a) transport services …

(b) services provided in cases where tax is payable solely by the person to whom they are supplied …'

5 Article 2 of that directive provides:

'Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any [VAT] charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of [the Sixth] Directive ...'

6 Under Article 3 of that directive:

'To qualify for refund, any taxable person as referred to in Article 2 who supplies no goods or services deemed to be supplied in the territory of the country shall:

(a) submit to the competent authority … an application …

(b) produce evidence, in the form of a certificate issued by the official authority of the State in which he is established, that he is a taxable person for the purposes of [VAT] in that State. ...

(c) certify by means of a written declaration that he has supplied no goods or services deemed to have been supplied in the territory of the country during the period referred to in the first and second sentences of the first subparagraph of Article 7(1);

(d) undertake to repay any sum collected in error.'

7 Article 4 of that directive provides:

'To be eligible for the refund, any taxable person as referred to in Article 2 who has supplied in the territory of the country no goods or services deemed to have been supplied in the country other than the services referred to in Article 1(a) and (b) shall:

(a) satisfy the requirements laid down in Article 3(a), (b) and (d);

(b) certify by means of a written declaration that, during the period referred to in the first and second sentences of the first subparagraph of Article 7(1), he has supplied no goods or services deemed to have been supplied in the territory of the country other than services referred to in Article 1(a) and (b).'

8 The first paragraph of Article 5 of the Eighth Directive provides as follows:

'For the purposes of this Directive, goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of [the Sixth Directive] as applicable in the Member State of refund.'

9 Article 6 of the directive is worded as follows:

'Member States may not impose on the taxable persons referred to in Article 2 any obligation, in addition to those referred to in Articles 3 and 4, other than the obligation to provide, in specific cases, the information necessary to determine whether the application for refund is justified.'

10 Article 7(1) of that directive provides as follows:

'The application for refund provided for in Articles 3 and 4 shall relate to invoiced purchases of goods or services or to imports made during a period of not less than three months or not more than one calendar year. ...'

The VAT Directive

11 The VAT Directive repealed and replaced the Sixth Directive as of 1 January 2007. According to recitals 1 and 3 of the VAT Directive, the Sixth Directive had to be recast in order to present all the applicable provisions in a clear and rational manner, recasting the structure and wording without, in principle, bringing about any substantive changes.

12 Article 9(1) of the VAT Directive provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. ...’

13 According to Article 70 of that directive:

‘The chargeable event shall occur and VAT shall become chargeable when the goods are imported.’

14 Article 146(1) of that directive provides as follows:

‘Member States shall exempt the following transactions:

(a) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

...’

15 Article 167 of that directive, which has the same wording as Article 17(1) of the Sixth Directive, provides:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

16 Article 168 of the VAT Directive, the content of which is, in essence, identical to that of Article 17(2) of the Sixth Directive, provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

...

(e) the VAT due or paid in respect of the importation of goods into that Member State.’

17 The content of Article 169 of the VAT Directive is, in essence, identical to that of Article 17(3) of the Sixth Directive. Article 169 provides:

‘In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;

(b) transactions which are exempt pursuant to … [Article 146] …;

...’

18 Article 170 of the VAT Directive is set out in the following terms:

‘All taxable persons who, within the meaning of Article 1 of [the Eighth 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 the following:

(a) transactions referred to in Article 169;

...'

19 Article 171(1) of the VAT Directive provides:

'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 Eighth Directive].

...'

Romanian law

20 Article 1472 of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 on the Tax Code), entitled 'Refund of tax to taxable persons not identified for VAT purposes in Romania', provides:

'(1) Under the conditions established by law:

(a) a taxable person who is not identified and who is under no obligation to be identified for VAT purposes in Romania and is established in another Member State may apply for a refund of the tax paid …

...'

21 Paragraph 49 of the Hot?rârea Guvernului nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Codului fiscal (Government Decree No 44/2004 approving the detailed rules for the implementation of the Tax Code) provides:

'...

(3) The taxable person ... shall be the taxable person who ... was not identified and was under no obligation to be identified for VAT purposes in Romania ... who is not established in Romania and also does not have a fixed establishment there from which economic activities are carried out, and who, during the same period, did not supply any goods or services in Romania ...

(4) Refund of the tax ... shall be granted to the taxable person within the meaning of subparagraph 3 if the goods and services ... imported into Romania, for which the tax has been paid, are used by the taxable person for:

(a) transactions relating to his economic activity, in respect of which the taxable person would be authorised to deduct the tax if those transactions had been effected in Romania ...;

...

(5) In order to satisfy the conditions for refund, every taxable person for the purpose of subparagraph 3 must meet the following requirements:

...

(c) he must certify by means of a written declaration that during the period referred to in his

application for refund he has supplied no goods or services supplied or deemed to have been supplied in Romania ...;

...

(6) The competent tax authorities may not impose on taxable persons seeking a refund ... any obligations in addition to those referred to in subparagraph 5. Exceptionally, the competent tax authorities may request the taxable person to provide further information necessary in order to determine whether the application for a refund is justified.

...'

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

22 SMS group is an undertaking established in Germany that sells and erects steel processing systems. On 7 February 2008 SMS Meer, an entity that has since been absorbed by SMS group, concluded, as seller, contract 'No 27' with Zimekon Handels GmbH, Austria ('the purchaser') for the construction and supply of a pipe-welding system for the manufacture of steel piping and pipe profiles by means of longitudinal electric welding ('the RSA'). The consignee of the RSA was OOO Zimekon, Ukraine.

23 By virtue of the payment plan set out in contract No 27, the purchaser had to pay, for the first phase of the manufacture of the RSA, an advance of EUR 2 000 000 in March 2008, then EUR 800 000 by 15 April 2008, a further EUR 1 000 000 by 15 May 2008, and, ultimately, EUR 1 000 000 by 15 June 2008. The delivery to the consignee was due between 1 June 2009 and 30 September 2009, provided that the payments provided for in that contract had been effected within the prescribed period.

24 On 26 June 2008, although the purchaser had paid only the advance of EUR 2 000 000, SMS Meer concluded a subcontracting agreement with Asmas AES, established in Turkey, the subject matter of which was the supply of equipment needed by SMS Meer to manufacture the RSA ('the goods at issue'). On 5 November 2008, at the purchaser's request, the performance of contract No 27 was nonetheless suspended until 1 September 2009, as the purchaser had found itself in financial difficulties. SMS Meer requested the purchaser to make the outstanding payments, specifying that work would only resume after the amounts due had been paid.

25 On 14 September 2009, SMS Meer imported the goods at issue from Turkey into Romania and paid the VAT charged on those goods in the amount of 1 487 739 Romanian lei (RON) (approximately EUR 327 500). Following importation, those goods were stored in a warehouse located in Romania.

26 Since the purchaser failed to make the remaining payments, the performance of contract No 27 was not resumed. According to SMS group, the goods at issue could not be used for other projects and it intends to sell them for scrap.

27 On 23 December 2009, SMS Meer applied to the tax authority for a refund of the VAT paid to the Romanian State upon importation of the goods at issue. In response to a request for additional information by the tax authority, SMS Meer explained that, in the event of non-performance of contract No 27, it intended to export those goods. It did not however provide any specific information as to the destination or the date on which the exportation was to take place.

28 The tax authority nonetheless refused to refund the VAT, considering that SMS Meer had not provided any supporting documents demonstrating the subsequent movements of the goods at

issue and their final recipient. After the administrative appeal filed by SMS Meer against the refusal to refund was dismissed by the complaints department of the tax authority, the Curtea de Apel Bucure?ti (Bucharest Court of Appeal, Romania), by a first judgment of 30 May 2012, dismissed SMS Meer's action for annulment of those two tax authority decisions.

29 That first judgment was however overturned by the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice, Romania), which referred the case back to the Curtea de Apel Bucure?ti (Bucharest Court of Appeal). By judgment of 9 July 2014, that court again dismissed SMS Meer's claim as unfounded, since, according to that court, the tax authority had been right to require SMS Meer to demonstrate the subsequent movement of the goods at issue. SMS Meer was required, under Article 1472(1)(a) of Law No 571/2003, to provide proof of the destination of the goods imported into Romania, their actual destination being relevant for the tax regime applicable.

30 SMS Meer appealed against the judgment of 9 July 2014 on a point of law, maintaining that the conclusion of contract No 27 with the purchaser and its partial performance constituted a taxable transaction. Moreover, contract No 27 had been performed as the result of the payment of an advance of EUR 2 000 000 on the total price agreed, the conclusion of a subcontracting agreement and the purchase from a Turkish supplier of some of the components necessary to manufacture the RSA. SMS Meer had therefore established a direct link between the importation of the goods at issue and its taxable transactions. The VAT refund cannot depend, according to SMS Meer, on the proof of circulation of those goods following importation, given that contract No 27 had not in the end been completed. At the time the goods were imported, the parties still wished to carry out the transaction.

31 According to the referring court, at the time of the importation, there was a serious risk for SMS Meer that contract No 27 would be terminated, in so far as the purchaser had failed to respect the payment schedule under that contract. In those circumstances, the question was whether the fact that the importation of those goods had been carried out when the performance of the contract was suspended meant that the importation of the goods at issue was no longer linked to that performance.

32 In those circumstances, the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 2, 3, 4 and 5 of [the Eighth Directive] in conjunction with Article 17(2) and (3)(a) of [the Sixth Directive] be interpreted as precluding a practice of a national tax administration which considers that there is no objective evidence to confirm the declared intention of the taxable person to use the goods imported in connection with its economic activity in the case where, on the date of the actual importation, the contract for the performance of which the taxable person had purchased and imported the goods was suspended, with the serious risk that the subsequent supply/transaction for which the imported goods were intended would no longer be carried out?

(2) Does proof of the subsequent movements of the imported goods, that is to say, establishing whether, and in what manner, the goods were actually intended for the taxable transactions of the taxable person, constitute an additional condition imposed with a view to refunding the VAT, in addition to those listed in Articles 3 and 4 of [the Eighth Directive] and prohibited by Article 6 of the directive, or does such proof constitute necessary information as regards the substantive condition for the refund relating to the use of the imported goods in connection with taxable transactions, which the tax authority may request under Article 6 of that directive?

(3) Can Articles 2, 3, 4 and 5 of [the Eighth Directive] in conjunction with Article 17(2) and (3)(a)

of [the Sixth Directive] be interpreted as meaning that the right to a refund of VAT may be denied in the case where the subsequent transaction planned, in connection with which the imported goods were intended to be used, is no longer carried out? In those circumstances, does the actual destination of the goods, that is to say, whether they were in fact used, in what way and in which territory, namely in that of the Member State in which the VAT was paid or outside that State, have any relevance?'

Consideration of the questions referred

33 By its three questions, which should be examined together, the referring court asks, in essence, whether the Eighth Directive, read in conjunction with Article 170 of the VAT Directive, must be interpreted as precluding a refusal by a Member State to refund the VAT paid on the importation of goods to a taxable person who is not established on its territory in circumstances such as those in the main proceedings where, at the time of importation, the performance of the contract in connection with which the taxable person purchased and imported those goods was suspended, the transaction for which they were intended to be used was in the end not carried out, and the taxable person did not provide proof of their subsequent movements.

34 In order to answer this question, it should be borne in mind, first of all, that the aim of the Eighth Directive is to establish detailed rules for the refund of VAT paid in a Member State by taxable persons established in another Member State and thus to harmonise the right to refund arising from Article 170 of the VAT Directive (judgment of 28 June 2007, *Planzer Luxembourg*, C?73/06, EU:C:2007:397, paragraph 34 and the case-law cited).

35 In that context, it follows from Article 2 of the Eighth Directive that each Member State is to refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down in that directive, any VAT charged in respect of, inter alia, the importation of goods into the first Member State, in so far as those goods are used for the purposes of the transactions referred to in Article 170 of the VAT Directive.

36 In that regard, Articles 3 and 4 of the Eighth Directive set out the formalities to be met in order to obtain such a refund.

37 As the European Commission rightly stated in its written observations, the purpose of the Eighth Directive is not to determine either the conditions under which a right to refund may be exercised, or the scope of that right. Indeed, it is clear from Article 5 of that directive that the right to a VAT refund is determined according to the relevant provisions of the VAT Directive.

38 In this connection, it should be noted that the right of a taxable person established in a Member State to obtain the 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 (judgment of 25 October 2012, *Daimler and Widex*, C?318/11 and C?319/11, EU:C:2012:666, paragraph 41 and the case-law cited).

39 According to the settled case-law of the Court, that right to deduct is an integral part of the VAT scheme and in principle may not be limited. It is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (judgment of 22 June 2016, *Gemeente Woerden*, C?267/15, EU:C:2016:466, paragraph 31 and the case-law cited).

40 The deduction system, and accordingly the refund system, is intended to relieve the operator entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT therefore ensures complete neutrality of taxation of all

economic activities, whatever their purpose or results, provided that they are themselves subject to VAT (judgment of 22 March 2012, *Klub*, C?153/11, EU:C:2012:163, paragraph 35 and the case-law cited).

41 As concerns more specifically the conditions of the right to refund, it is clear from Article 170 of the VAT Directive, read in conjunction with Article 169 of that directive, that all taxable persons who, within the meaning of Article 1 of the Eighth Directive, are not established in the Member State in which they import goods subject to VAT are entitled to obtain a refund of that VAT in so far as the goods are used either for their transactions relating to the activities referred to in the second subparagraph of Article 9(1) of the VAT Directive, carried out outside the Member State in which that tax is payable or paid, in respect of which VAT would be deductible if they had been carried out within that Member State, or for certain transactions which are exempt.

42 That right to refund arises, in accordance with Articles 70 and 167 of the VAT Directive, at the time when the tax becomes chargeable, namely when the goods are imported (see, by analogy, judgment of 22 March 2012, *Klub*, C?153/11, EU:C:2012:163, paragraph 36 and the case-law cited).

43 With regard, in the first place, to the question whether SMS Meer can be considered to be a taxable person within the meaning of Article 1 of the Eighth Directive, it should be borne in mind that that provision lays down, in essence, two cumulative conditions. First, the taxable person in question must not possess, during the period referred to in Article 7(1) of that directive, any establishment in the Member State from which he is claiming a refund. Secondly, he must not during that period have made any supplies of goods or services in respect of which the place of supply is deemed to be in that Member State, with the exception of certain supplies of specified services (see, to that effect, judgment of 6 February 2014, *E.ON Global Commodities*, C?323/12, EU:C:2014:53, paragraph 42).

44 In the present case, it is not disputed that SMS Meer meets those conditions. In particular, it is common ground that, at the time of the importation at issue in the main proceedings, that undertaking was subject to VAT in Germany, as an undertaking carrying out economic activities in that Member State consisting in the sale and erection of steel processing systems, and that it was not required to register for VAT purposes in Romania.

45 As concerns, in the second place, whether SMS Meer acted as a taxable person on importation of the goods at issue into Romania, it should be noted that a ‘taxable person’ is defined, according to Article 9(1) of the VAT Directive, by reference to the term ‘economic activity’ (judgment of 29 November 2012, *Gran Via Moine?ti*, C?257/11, EU:C:2012:759, paragraph 24 and the case-law cited).

46 An individual who imports goods for the purposes of an economic activity within the meaning of that provision does so as a taxable person, even if the goods are not used immediately for that economic activity (see, to that effect, judgment of 29 November 2012, *Gran Via Moine?ti*, C?257/11, EU:C:2012:759, paragraph 25 and the case-law cited). It is settled case-law that a person who incurs investment expenditure with the intention, confirmed by objective evidence, of carrying out an economic activity within the meaning of Article 9(1) of the VAT Directive must be regarded as a taxable person (see, to that effect, judgments of 14 February 1985, *Rompelman*, 268/83, EU:C:1985:74, paragraph 24; of 29 February 1996, *INZO*, C?110/94, EU:C:1996:67, paragraph 17; and of 22 October 2015, *Sveda*, C?126/14, EU:C:2015:712, paragraph 20 and the case-law cited).

47 Whether a taxable person acts as such is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the

period between the acquisition of the asset and its use for the purposes of the taxable person's economic activity (judgment of 22 March 2012, *Klub*, C?153/11, EU:C:2012:163, paragraph 41 and the case-law cited).

48 In these circumstances, it should be borne in mind that, in preliminary ruling proceedings, the national court has sole jurisdiction to determine the facts in the case before it and to interpret the national legislation. However, the Court, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file in the main proceedings and on the observations submitted to it, in order to enable the national court to give judgment (judgment of 11 May 2017, *Posnania Investment*, C?36/16, EU:C:2017:361, paragraph 37 and the case-law cited).

49 In the present case, it is established that SMS Meer, after receiving an advance of EUR 2 000 000, proceeded on 26 June 2008 to conclude a subcontracting agreement, having as subject matter the goods at issue, which were purchased as equipment necessary for the construction of the RSA and, therefore, with a view to the performance of contract No 27. It appears to follow from those findings that that undertaking imported the goods at issue with the intention, confirmed by objective evidence, of carrying out an economic activity.

50 In that regard, the mere fact that contract No 27 was suspended at the time of importation of the goods at issue is irrelevant by reason, inter alia, of the fact that it must be presumed that SMS Meer would have been in breach of its contractual obligations towards its subcontractor if it had refused the delivery of the goods on the sole ground that contract No 27 was suspended. It was, moreover, only after those goods had been imported that the performance of the contract was definitively not resumed, for reasons beyond SMS Meer's control, namely the payment difficulties experienced by the purchaser.

51 SMS Meer therefore acted, at the time of the importation of the goods at issue, as a taxable person within the meaning of Article 9(1) of the VAT Directive.

52 With regard, in the third place, to the use of the goods at issue for transactions referred to in Article 170 of the VAT Directive, it is common ground that the consignee of the RSA, for the construction of which SMS Meer acquired those goods, was in Ukraine. Accordingly, the importation of those goods had taken place for the purpose of, ultimately, exportation, within the meaning of Article 146 of the VAT Directive, a transaction to which Article 170 of that directive refers.

53 In those circumstances, it must be considered that SMS Meer, on importation of the goods at issue into Romania, acquired the right to a refund of the VAT paid.

54 The existence of that right is not called into question by the fact that the transaction in the context of which the goods at issue were to be used was in the end not carried out and that SMS Meer was not able to provide proof, required by the tax authority, of the subsequent movements of those goods.

55 It is settled case-law of the Court that, in the absence of fraud or abuse, and subject to any adjustments which may be made in accordance with the conditions laid down by the VAT Directive, the right of refund, once it has arisen, is retained (see, by analogy, judgment of 22 March 2012, *Klub*, C?153/11, EU:C:2012:163, paragraph 46 and the case-law cited).

56 More specifically, where the taxable person has been unable to use the goods or services which gave rise to a refund in the context of the planned transaction by reason of circumstances beyond his control, the right of refund is retained since, in such a case, there is no risk of fraud or

abuse capable of justifying a refusal to refund (see, by analogy, judgment of 22 March 2012, *Klub*, C?153/11, EU:C:2012:163, paragraph 47 and the case-law cited). Such considerations have all the more reason to apply to a taxable person, such as SMS Meer, given that, according to its statements, it had no other use for the goods at issue.

57 It follows that, in the present case, to the extent that the national tax authorities have no objective evidence proving that the right to a refund arose abusively or fraudulently, which is ultimately for the referring court to verify, events following the importation are irrelevant. In particular, requiring SMS Meer to produce proof that the goods at issue were ultimately exported from Romania is tantamount, in reality, to adding a substantive condition to the eligibility for refund, which is not provided for by the VAT system.

58 In the light of all the foregoing considerations, the answer to the questions asked is that the Eighth Directive, read in conjunction with Article 170 of the VAT Directive, must be interpreted as precluding a refusal by a Member State to refund the VAT paid on the importation of goods to a taxable person who is not established on its territory in circumstances such as those in the main proceedings where, at the time of importation, the performance of the contract in connection with which the taxable person purchased and imported those goods was suspended, the transaction for which they were intended to be used was in the end not carried out, and the taxable person did not provide proof of their subsequent movements.

Costs

59 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 (Tenth Chamber) hereby rules:

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, read in conjunction with Article 170 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as precluding a refusal by a Member State to refund the value added tax paid on the importation of goods to a taxable person who is not established on its territory in circumstances such as those in the main proceedings where, at the time of importation, the performance of the contract in connection with which the taxable person purchased and imported those goods was suspended, the transaction for which they were intended to be used was in the end not carried out, and the taxable person did not provide proof of their subsequent movements.

[Signatures]

* Language of the case: Romanian.