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Opinion of Mr Advocate General Léger delivered on 27 May 1997. - Finanzamt Osnabrück-Land v Bernhard Langhorst. - Reference for a preliminary ruling: Bundesfinanzhof - Germany. - Value added tax - Interpretation of Articles 21(1)(c) and 22(3)(c) of the Sixth Directive 77/388/EEC - Document serving as an invoice - Credit note issued by the buyer and not contested by the seller as regards the amount of tax shown. - Case C-141/96.

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Opinion of the Advocate-General

1 The Bundesfinanzhof (Federal Finance Court) brings before the Court for the first time the practice of self-billing, in which the buyer of goods or the recipient of services himself draws up the invoice for the economic transaction for which he is to pay.

2 In view of the legal consequences attached to the concept of an invoice under the Community legislation relating to value added tax (`VAT'), the recognition of that procedure by the laws of certain Member States logically led to national courts having to consider the legal effects of the documents drawn up and issued under the conditions defined by the various Member States. (1)

3 It is thus appropriate to determine whether the characteristics of a document drawn up by the debtor rather than the creditor are close enough to those of a traditional invoice for it to be acknowledged as having an identical function in the common system of VAT, even though certain provisions of the Sixth VAT Directive (2) appear to preclude such an equation.

I - Legal and factual background

A - Facts and national proceedings

4 Mr Bernhard Langhorst, the plaintiff in the main proceedings, declared the turnover for 1985 of his agricultural business after having elected, as permitted by Paragraph 24(4) of the Umsatzsteuergesetz in its 1980 version (hereinafter `the UStG'), (3) to be taxed at the rate of 7%, under the general provisions of the UStG, rather than at the rate of 13% provided for in the first sentence of Paragraph 24(1) of that Law.

5 Not being aware of that election, livestock dealers to whom Mr Langhorst had supplied fat pigs issued him with credit notes mentioning separately VAT calculated at the rate of 13%. Mr Langhorst did not initially contest the amount of VAT mentioned in the credit notes.

6 He then brought proceedings in the Finanzgericht (Finance Court), which gave a judgment reducing the amount of tax. The Finanzamt (Tax Office) appealed on a point of law to the Bundesfinanzhof.

B - National legislation

7 The Bundesfinanzhof considers that the reduction was correctly determined by the Finanzgericht, but that the appeal by the Finanzamt might nevertheless succeed under the first sentence of Paragraph 14(2) of the UStG. Paragraph 14(2) provides as follows:

`If the trader has in an invoice for a supply or other service shown separately a higher amount of tax than he owes under this Law in respect of the transaction, then he shall also owe the additional amount. If he corrects the amount of tax as against the recipient, then Paragraph 17(1) shall apply correspondingly.'

8 The UStG equates credit notes with invoices, under certain conditions. Thus Paragraph 14(5) provides:

`A credit note by which a trader settles up for a taxable supply or other service made to him shall also be deemed to be an invoice. A credit note shall be recognized if the following conditions are met:

1. The trader providing the service (the recipient of the credit note) must be entitled under subparagraph 1 to show the tax separately in an invoice.

2. There must be agreement between the issuer and the recipient of the credit note that the supply or other service is to be settled by a credit note.

3. The credit note must include the information prescribed in the second sentence of subparagraph 1 above. (4)

4. The credit note must have been delivered to the trader providing the service.

Sentences 1 and 2 above shall apply by analogy to credit notes which the trader issues as payment or partial payment for a taxable supply or other service which has not yet been carried out. The credit note shall cease to have effect as an invoice in so far as the recipient contests the amount of tax shown therein.'

9 The Bundesfinanzhof considers it necessary to interpret Paragraph 14(2) of the German UStG in accordance with Community law. (5)

C - The national court's questions and the relevant provisions of Community law

10 It consequently refers the following three questions to the Court:

`1. Is it permissible under Article 22(3)(c) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes for a credit note within the meaning of Paragraph 14(5) of the Umsatzsteuergesetz 1980 to be regarded as an invoice or other document serving as an invoice (Article 21(1)(c) of the Sixth Directive)?

2. If so, is it permissible under Article 21(1)(c) of the Sixth Directive for a person who accepts a credit note showing a higher amount of tax than that owed by reason of taxable transactions, and does not contest in that respect the amount of tax mentioned in the credit note, to be regarded as a person who mentions value added tax in an invoice or other document serving as an invoice and is therefore liable to pay that value added tax?

3. Can the recipient of a credit note, in the circumstances set out in Question 2, rely on Article 21(1)(c) of the Sixth Directive if the value added tax mentioned in the credit note is claimed from him as a tax debt to the extent of the difference between the tax mentioned and the tax owed by reason of taxable transactions?'

11 The national court states that the third question arises only if the answer to the second question is negative. (6)

12 Article 21(1) of the Sixth Directive lists the persons liable to pay VAT under the internal system. Points (a) and (c) specify that

`(a) taxable persons who carry out taxable transactions other than those referred to in Article 9(2)(e) and carried out by a taxable person resident abroad ...

...

(c) any person who mentions the value added tax on an invoice or other document serving as invoice'

are liable to pay VAT.

13 Article 22 of the Sixth Directive principally determines the obligations of persons liable to pay VAT under the internal system. Article 22(3) deals with invoices and their content. Points (a) and (c) state:

`(a) Every taxable person shall issue an invoice, or other document serving as invoice in respect of all goods and services supplied by him to another taxable person ...

...

(c) The Member States shall determine the criteria for considering whether a document serves as an invoice.'

II - Answers to the national court's questions

14 By its questions the Bundesfinanzhof essentially seeks to know

- whether a credit note drawn up by the beneficiary of a supply of goods or provision of services (`the recipient of the goods or services') may be equated with an invoice within the meaning of the Sixth Directive;

- whether the trader who has carried out the economic transaction (`the trader' or `the recipient of the credit note') and has not challenged the excessive amount of VAT shown in the credit note may for that reason be regarded as the person who has mentioned it and is consequently liable to pay it; and

- in the event that, under the relevant provisions of the Sixth Directive cited above, the trader is not liable to pay the excess amount of VAT because he may not be regarded as the person who has mentioned it, whether he may rely on that provision to contest the obligation to pay under German law.

A - The first question: whether a credit note issued by the recipient of a supply of goods or services may be equated with an invoice within the meaning of the Sixth Directive

15 A precise delimitation of the concept of an invoice within the meaning of the Sixth Directive is of use in view of the significant part played by that document in the Community legislation on VAT.

16 The invoice constitutes the documentary evidence of the amount of VAT owed by the trader, thus serving both the payment of that tax and the deduction of the tax paid by the previous trader. (7)

17 The Sixth Directive contains no definition of the terms `invoice' and `document serving as invoice' used in Articles 21(1)(c) and 22(3)(a). After listing the minimum conditions relating to the information an invoice must by virtue of its very purpose contain, (8) the directive leaves it to the Member States to determine the criteria for considering whether a document serves as an invoice. (9)

18 The Federal Republic of Germany made use of that power by enacting Paragraph 14(5) of the UStG, which introduces the credit note at issue in these proceedings.

19 The Court has ruled on two occasions on the extent of the power thus conferred on the Member States. (10) In both cases it adopted a position favourable to the Member States and allowed them a considerable discretion.

20 In Jeunehomme and EGI, on the basis also of Article 22(8) of the Sixth Directive, which allows Member States to `impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud', it was held that a Member State could require invoices to include additional particulars. (11)

21 In Reisdorf the Court held that Member States were permitted to `regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves'. (12)

22 The Court was careful to state, however, that that power must be exercised consistently with `one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected, under the supervision of the tax authorities'. (13)

23 The aim thus described reflects the concern which, in my opinion, the Court should continue to be guided by in determining requirements relating to invoicing, although, unlike in the cases cited, the relevant criterion for classification of the credit note is linked not only to its content but also to the person who issues it.

24 The national court refers in its first question inter alia to Article 21(1)(c) of the Sixth Directive. That provision forms the logical reference point for the present case, in view of the fact that the proceedings pending in the German court concern an amount of VAT which differs from that owed by reason of the taxable transaction alone. The mistake affecting the amount shown in the credit note would thus no longer make the trader liable in his capacity as a taxable person within the meaning of Article 21(1)(a), but in his capacity as a person who mentions VAT on an invoice or document serving as an invoice.

25 That provision, however, cited by the national court in order to define the legal context of the case, is of no use in answering the first question, since it gives no indication of whether or not the decisive factor in deciding whether a credit note is a document serving as an invoice is the identity of the person who issues or delivers it.

26 The present question seeks to establish whether the power given to Member States by Article 22(3)(c) of the Sixth Directive permits a document drawn up not by the trader but by the recipient of the goods or services to be regarded as an invoice.

27 A literal interpretation of Article 22(3)(a), which describes the taxable person as the person who is to issue the invoice, argues against the conclusion that the recipient of the goods or services, who cannot claim to be the taxable person with respect to the VAT at issue, may fulfil the obligation of issuing an invoice and that the trader may be allowed to escape that obligation. The credit note would then not be capable of taking the place of the invoice.

28 I do not support such a reading, however, which I consider too formal. The aim pursued by the legislature when drawing up the relevant provision must be considered when interpreting it. (14)

29 Since its aim, as stated above, is to ensure that the tax is correctly levied and to avoid fraud, (15) there appears to be no valid reason why the document drawn up by the recipient of the goods or services should not serve as an invoice, where that document contains the information prescribed for invoices by the Sixth Directive (16) and its addressee is able to correct it if necessary.

30 In those circumstances, by exercising his power to check and correct, the trader remains the person who issues the credit note, the drawing up of which he has merely delegated, as it were, to his customer. The credit note does not lose its function of documenting the trader's fiscal rights and obligations, since it contains the same information as a traditional invoice and the trader is free to approve its contents. He thus keeps responsibility for drawing up the invoices, whatever their form, and ultimately remains their true author.

31 I consider, as moreover do all the intervening Governments and the Commission, that self-billing as regulated by Paragraph 14(5) of the UStG fulfils the conditions under which uncontested credit notes may be equated with invoices issued by the trader.

32 Under Paragraph 14(5)(3), the credit note must include the same information as that prescribed for invoices, including `the consideration for the supply or other service' and `the amount of tax due on the consideration'.

33 A power of control for the trader is ensured by Paragraph 14(5)(2), which states that the parties to the contract must agree that a credit note is to be used. Again, under Paragraph 14(5)(4), `the credit note must have been delivered to the trader providing the service', and the second sentence of the second indent provides that `the credit note shall cease to have effect as an invoice in so far as the recipient contests the amount of tax shown therein'.

34 The trader admittedly does not have an express power of rectification, but his right to deprive a credit note of its status as an invoice by contesting its content nevertheless gives him complete control of the classification in law of that document, which suffices to accept the equation of that document with an invoice within the meaning of the Sixth Directive.

B - The second question

35 Two readings of the question are possible.

36 One reading of the question itself, in the light of the grounds stated in the order for reference, is that the Bundesfinanzhof is asking the Court to state whether the fact that a trader has accepted, without contestation, an incorrect credit note issued by the recipient of the goods or services means that he may be regarded as a person who has mentioned VAT within the meaning of Article 21(1)(c) of the Sixth Directive. If the answer is affirmative, the national court concludes automatically that the trader is liable for the VAT mentioned in the credit note, without raising questions on that point, which it regards as not in doubt.

37 The other reading is that the national court's question refers also to the precise amount of VAT - that stated in the credit note or that corresponding to the taxable transaction - which the trader ultimately has to pay.

38 In my opinion, the first reading is correct. The grounds of the order for reference show that the Bundesfinanzhof did not make the reference in order to establish whether the first sentence of Paragraph 14(2) of the UStG may, having regard to Community law, require payment of the amount of VAT shown in the invoice rather than the amount corresponding to the taxable transaction. The question concerns the effect of Article 21(1)(c) of the Sixth Directive on the applicability to credit notes of the first sentence of Paragraph 14(2). Common to those two provisions is that they both designate the person who has mentioned the VAT as liable. That point, which distinguishes a credit note from an invoice, is at the heart of the order for reference.

39 Thus according to the national court, `it would be doubtful who was to be regarded as responsible for the excessive separate mention of tax ...: the livestock dealers (recipients of supplies) because of issuing the credit notes or the plaintiff (provider of supplies) in view of the fact that he neither took steps to have the credit notes corrected by the dealers nor, with the aid of the information in the credit notes, issued the dealers with a separate tax mention in the correct amount'. (17)

40 The Bundesfinanzhof also states that it is `of decisive importance ... whether the first sentence of Paragraph 14(2) of the UStG 1980 is applicable with respect to the plaintiff', (18) and that it is important `to proceed from the correct Community law framework for the national legislature in interpreting and applying the provision'. (19)

41 I consider, in other words, that the Court is being asked to rule whether the above provisions of the Sixth Directive allow a trader to be made liable for the excess amount of VAT mentioned in a credit note if he has not contested that excess amount, in the same way that he would be liable for excess tax mentioned in an invoice issued by him.

42 However, in case the Court should not accept that interpretation of the reference, I shall examine the scope of Article 21(1)(c) of the Sixth Directive independently of the nature of the document with the incorrect mention of VAT.

1. Whether the recipient of a credit note who has not contested the amount stated in that note is liable

43 A trader who carries out a taxable transaction is liable in principle for the corresponding VAT, and as such must issue an invoice which mentions it. As I have concluded, (20) the obligation to issue an invoice is satisfied in the case of self-billing if the conditions under which a credit note may be equated with an invoice are met, so that the special nature of that situation makes no difference to the liability of the trader.

44 It might be different, however, if for various reasons - fraud or mistake - the amount of VAT appearing in the credit note does not correspond to the VAT due. National law and Community law appear, on that hypothesis, to limit the extent to which a credit note is equated with an invoice.

45 While the UStG clearly states the principle of payment by the trader of the amount of VAT mentioned by him in an invoice where that amount is greater than that for which he was originally liable, it is silent where the same difference relates, as in the present case, to the content of a credit note.

46 Moreover, the wording of the Sixth Directive raises a doubt as to the national court's discretion to require the trader, as the recipient of the credit note, to pay the excess. Article 21(1)(c), which refers to the case when, as here, the amount stated does not correspond to the taxable transaction, imposes liability for VAT on any person who mentions the tax in an invoice or document serving as invoice. (21)

47 The recipient of the credit note has not, strictly speaking, himself mentioned the excess amount of VAT in that document.

48 It would then follow that while the wording of Article 22(3)(a) of the Sixth Directive does not preclude the trader from remaining the issuer of the credit note, the wording of the said provisions of Article 21 requires, by contrast, the recipient of the goods or services to be liable for the VAT.

49 Here too I prefer a more flexible interpretation of the text. By including among those liable for VAT, besides the taxable person, the person who mentions VAT in the invoice, the provision aims at discouraging tax fraud. It places the liability for payment of the VAT on persons who issue invoices which are incorrect or correspond to fictitious economic operations. (22)

50 The aim pursued does not justify a different interpretation from that I have suggested for the answer to the first question. A trader faced with an incorrect credit note, who is entitled to check its content and correct it, must if he does not contest it be regarded as the person who has mentioned the tax. He is therefore liable for the errors which have been made, which may be indicative of fraud.

51 I consider, moreover, in common with all the intervening Governments and the Commission, that the answer cannot vary according to whether the mention of VAT is in a traditional invoice or a credit note. If under the above conditions a credit note is equated with an invoice, on the ground that the trader remains the real issuer of the credit note, it is natural that the legal consequences attached to the two documents should be the same. The equation would otherwise be purely formal and the different rules would create unjustified discrimination between traders who issue their invoices themselves and traders who use the self-billing system.

2. The obligation to pay the VAT mentioned in the invoice or credit note

52 If the amount invoiced does not, or not completely, correspond to the taxable economic transaction, does the obligation to pay the VAT extend to the entire amount shown?

53 That question, the answer to which must be the same in Community law whether the document in which the incorrect amount is mentioned is an invoice or a credit note, arises in similar terms to those in the Genius Holding case.

54 In that case the Court was asked whether the amount of VAT which is owed solely because it is mentioned in an invoice may be taken into account for the exercise of the right to deduct provided for in the Sixth Directive. The Court held that it could not, considering that `the right to deduct may be exercised only in respect of taxes actually due, that is to say, the taxes corresponding to a transaction subject to VAT or paid in so far as they were due'. (23)

55 The Court, anxious to combat tax evasion, thus decided that it was necessary to determine the amount of the right to deduct by reference to the taxable transaction, which amounts to depriving invoices of their function of evidencing the right to deduct where they do not correspond to any transaction or are based on an overvalued tax base. (24) If there is a contradiction between them, the tax corresponding to the taxable transaction must take priority over the tax invoiced, so as not to allow an undue deduction to be made.

56 According to the Genius Holding judgment, the information in the invoice does not have as much weight as the reality of the taxable transaction, at least with regard to exercise of the right to deduct. The same question may arise in the present case with reference to the taxable person's obligation to pay VAT. (25)

57 On this point, my view is that the invoice should preserve its function of documentation. My reason for proposing that the Court should thus limit the scope of its previous case-law is no different from that which inspired the solution adopted in that case: to discourage tax evasion.

58 It would be an incitement to fraud if, in the event of a difference between the amount invoiced and the amount following from the taxable transaction, the incorrect part of the amount shown in the invoice could fall outside the obligation to pay on the part of the author of the invoice.

59 Above all, that would make the invoice purposeless and deprive the supervisory authorities of a reference document describing the economic operation, on the basis of which checks may be made.

60 This, moreover, is the solution the Court implicitly adopted in the Genius Holding judgment, when it observed that the Member States may `provide in their internal legal systems for the possibility of correcting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith'. (26) In other words, the principle is that the person who issues an invoice mentioning excess tax must pay it, unless he is able to prove that there was no fraudulent intent behind the amount stated.

61 Moreover, the priority given to what is mentioned in the invoice is dictated by the relevant provisions of the Sixth Directive. The Genius Holding judgment is based largely on Article 17(2)(a) of the Sixth Directive, concerning the right to deduct. (27) In the present case, the provision whose scope is decisive is Article 21(1)(c) of the Sixth Directive. That provision admittedly defines the person liable for VAT and gives no direct information as to the amount to be paid. However, the fact that it is intended to apply to cases where VAT is not legally due, and where the economic operation cited might not even exist, shows that the mention in the invoice is all that matters, since it constitutes the only means of referring to a specific figure.

62 In view of the answer given to the second question, there is no need to express an opinion on the national court's third question.

Conclusion

63 In the light of the above considerations, I propose that the Court should answer as follows:

(1) Article 22(3)(c) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax:

uniform basis of assessment, allows Member States to regard a credit note issued by the recipient of a supply of goods or services as a `document serving as an invoice', where it includes the information prescribed for invoices by the Sixth Directive and its content may be corrected or contested by the trader who has carried out the economic operation.

(2) Article 21(1)(c) of the Sixth Directive allows a person who accepts a credit note mentioning a greater amount of value added tax than that due, without contesting the amount thus mentioned, to be regarded as a person who has mentioned value added tax in an invoice or document serving as an invoice and is consequently liable to pay it.

(1) - The United Kingdom Government, for example, stated at the hearing that the practice of self-billing existed in that country before the introduction of VAT in 1973, when United Kingdom legislation expressly acknowledged the principle of self-billing.

(2) - Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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).

(3) - Law on Turnover Tax of 26 November 1979 (BGBl. 1979 I, p. 1953), as amended by the Law of 18 August 1980 (BGBl. 1980 I, p. 1537, 1543).

(4) - The second sentence of Paragraph 14(1), points 5 and 6, prescribes: `Such invoices must include the following information: 5. the consideration for the supply or other service ... and 6. the amount of tax due on the consideration ...'.

(5) - Order for reference, p. 4.

(6) - Ibid., p. 13.

(7) - Article 18(1)(a) of the Sixth Directive.

(8) - Article 22(3)(b) states that `the invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions'.

(9) - Article 22(3)(c).

(10) - Joined Cases 123/87 and 330/87 Jeunehomme and EGI v Belgian State [1988] ECR 4517 and Case C-85/95 Reisdorf v Finanzamt Köln-West [1996] ECR I-6257.

(11) - Jeunehomme and EGI, paragraph 16. Paragraph 17 states, however, that such particulars must not, by reason of their number or technical nature, render the exercise of the right to deduction practically impossible or excessively difficult.

(12) - Paragraph 31.

(13) - Reisdorf, paragraph 24. See also the Jeunehomme and EGI judgment, paragraph 17.

(14) - If the Community legislature in 1977, like the German legislature in 1980, took no account of the practice of self-billing in the wording of the provision, that was no doubt because that practice was as yet little developed.

(15) - Point 22 above.

(16) - Footnote 8 above.

(17) - Order for reference, p. 10 et seq.

(18) - Ibid., p. 6, point II(2).

(19) - Ibid., p. 12, point III.

(20) - Points 29 to 31 above.

(21) - Point 24 above.

(22) - See points 10 and 14 of the Opinion of Advocate General Mischo in Case C-342/87 Genius Holding v Staatssecretaris van Financiën [1989] ECR 4227.

(23) - Judgment in Genius Holding, cited above, paragraph 13.

(24) - Ibid., paragraph 17.

(25) - The Bundesfinanzhof states that the rule of payment in full of the amount invoiced, laid down in the first sentence of Paragraph 14(2), is based on `the consideration that the recipient is entitled to deduct as input tax the tax which is invoiced to him separately' and that `the legislative plan thus clearly amounted to balancing the deduction of input tax on the basis of an excessive separate mention of tax, to the extent not justified by supplies, by establishing a corresponding tax liability' (order for reference, p. 9 et seq.). That provision thus derives from the right, recognized in the German case-law, of the recipient of the goods or services to deduct input tax `to the full extent of the amount of tax mentioned separately in an invoice, even if the amount exceed[s] the turnover tax owed on the basis of the taxable supply' (ibid., p. 9), which clashes with the Genius Holding judgment.

(26) - Genius Holding, paragraph 18.

(27) - That provision provides (emphasis added): `the taxable person shall be entitled to deduct from the tax which he is liable to pay: (a) value added tax due or paid ...'.