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Opinion of Mr Advocate General Saggio delivered on 13 April 2000. - Ministre du Budget and Ministre de l'Economie et des Finances v Société Monte Dei Paschi Di Siena. - Reference for a preliminary ruling: Conseil d'Etat - France. - Turnover tax - Common system of value added tax - Refund of the tax to taxable persons not established in the country - Article 17 of the Sixth Directive 77/388/EEC and Articles 2 and 5 of the Eighth Directive 79/1072/EEC. - Case C-136/99.

European Court reports 2000 Page I-06109

Opinion of the Advocate-General

1. This reference for a preliminary ruling concerns the right to a refund of value added tax, under Article 17 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, of a company which, not being established in the State in which it paid the value added tax and applied for a refund, requests reimbursement in respect of expenditure relating to transactions effected in the Member State of establishment, of which only some are subject to the subsequent application of value added tax.

The facts and the questions referred to the Court

2. Monte dei Paschi di Siena, the defendant in the main proceedings, is a banking and financial institution which has not established any seat of activity or branch in France, where it has only a representative office. On 6 December 1988 and 27 March 1990, it lodged with the French Ministère du Budget (Ministry for the Budget) and Ministère de l'Économie, des Finances et de l'Industrie (Ministry for the Economy, Finance and Industry) applications for the refund of value added tax for the years 1988 and 1989, respectively. These two applications were rejected on the grounds that the applicant had incurred the expenditure in connection with banking and financial transactions carried out in Italy and that those transactions, not being subject to value added tax in the Member State of establishment, did not give rise to a refund of value added tax paid for services received and goods acquired before the transactions were effected.

The Italian company brought an action challenging the two decisions before the Tribunal Administratif de Paris (Administrative Court, Paris). This was dismissed by judgment of 24 November 1992. The company then appealed to the Cour Administrative d'Appel de Paris (Administrative Appeal Court, Paris) which, in its decision of 30 January 1996, upheld the appeal and granted the company a partial refund in respect of the expenditure connected with the taxable transactions carried out specifically in Italy.

The Ministre du Budget (Minister for the Budget) and the Ministre de l'Économie, des Finances et de l'Industrie (Minister for the Economy, Finance and Industry) appealed against the decision of the appeal court to the Conseil d'État (Council of State).

3. In order to resolve the dispute, the Conseil d'État has referred the following questions for a preliminary ruling:

1. Do Articles 2 and 5 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 have the effect of granting to taxable persons established in a Member State of the Community where they are taxed only on a part of their turnover a right to a partial refund of the tax charged in another Member State in respect of goods or services which they have used in order to carry out, in the State in which they are established, transactions of which some are not taxed?

2. If they do, to what method of determining the portion of refundable tax do those provisions refer, and, in particular, is that portion to be determined according to the rules applicable in the State where the taxable person is established, or according to the rules in force in the State required to make the refund?

Substance

4. In this case the relevant Community provisions are Article 17(2) and (3)(a) of Directive 77/388 and Articles 2 and 5(1) of Directive 79/1072.

5. Article 17 of the Sixth Directive also accords the right to deduction of value added tax to taxable persons established in another country, that is to say in a State other than that in which they are subject to the tax and hence to its deduction. Paragraph 2 of this article stipulates that In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay (a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person. Moreover, according to subparagraph 3, Member States shall also grant the right to a deduction or refund (assuming, of course, that the tax has been collected) if the goods and services are used for transactions relating to the economic activities ... carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country.

Article 2 of the Eighth Directive, which governs the arrangements for the refund of value added tax provided for in the abovementioned Article 17, requires Member States to refund to any taxable person who is not established in the territory of the country but is established in another Member State ... any value added tax 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 Directive 77/388/EEC and of the provision of services referred to in Article 1(b), that is to say for other transactions of an economic nature. The first paragraph of Article 5 also stipulates that goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 ... as applicable in the Member State of refund.

6. With regard to the national legislation, the referring court and the French Government point out that the Code Général des Impôts (General Tax Code) accords the right to deduct value added tax for transactions carried out by businesses when value added tax has been charged on the price elements of a taxable transaction (Article 271). The same Code also extends this right to taxable persons established abroad (Article 242-O M) in respect of services and goods acquired in, or imported into, France and used for transactions carried out abroad, if those transactions would be

eligible for deduction if they were taxed in France.

7. All the parties to submit observations are agreed on the interpretation, no doubt obvious, of Article 17(3)(a) and the related implementing provisions of the Eighth Directive (in particular, Articles 2 and 5), as meaning that it also accords the right to a refund to businesses established in a Member State other than that of refund when the final transactions carried out by the taxable person in the Member State of establishment confer only a partial right to deduction, that is to say are only partially subject to subsequent tax, thereby giving rise to partial refund of the tax previously collected.

8. The parties refer to the Debouche case of 1996, in which the Court, interpreting, among other things, the abovementioned provisions of the Sixth and Eighth Directives, held that foreign taxable persons are entitled to a refund in a Member State other than that in which they are established when they do not benefit from exemption for the transactions carried out in the Member State of establishment and linked with the acquisition of goods or services on which value added tax has been paid and when that same expenditure is exempt in the State of refund.

On that occasion, the Court mainly relied on two considerations: firstly, it follows from Article 17(2) of the Sixth Directive that a taxable person who benefits from exemption for a downstream transaction, wherever it may be carried out, is not entitled to the deduction of tax paid upstream; secondly, the arrangements for application of the right to refund, as set out in the Eighth Directive, must not - according to the fifth recital of the Eighth Directive - be such as to lead to the treatment of taxable persons differing according to the Member State in the territory of which they are established. These rules must therefore be applicable without distinction to all businesses, whether established in the national territory or in another Member State, with the result that a non-established taxable person may not request a refund for expenditure not considered exempt from value added tax even when incurred by taxable persons established in the territory of the country.

The conclusions of the Court are very clear in this respect. Thus, eligibility for refund of value added tax depends on two conditions being met, namely, the final transaction must be taxed in the Member State of establishment and the tax on which a refund is requested must also be deductible for taxable persons established in the territory of the State in which the corresponding application is made.

9. Considering the source of the right to a refund which the Sixth Directive expressly grants to non-established taxable persons and the scope of that same right which, by virtue of Article 17, covers all the intermediate transactions for which value added tax cannot be passed on to the next level of production or trade and hence incorporated in the end price of the product, regardless of the Member State in which these transactions are carried out, it is quite obvious that the right to a refund cannot be denied where, as in the present case, the transactions carried out by a taxable person in the Member State of establishment give rise only to a right to partial deduction of the value added tax paid on acquisitions or on services received upstream in another Member State.

10. Thus, in the present case, it is more a matter of deciding what rules to use for determining the percentage of the value added tax deducted that ought to be refunded, which is the problem addressed in the second question referred for a preliminary ruling.

11. The French Government considers that Article 5 of the Eighth Directive, which specifies that the right to have tax refunded is that applicable in the Member State of refund, means that the law of that State should be applied for the purpose of determining, in a case such as that at issue, the proportion of value added tax refundable.

It is not possible to share this view. It implies that not all taxes deductible, in so far as they have been levied on expenditure linked to successive transactions which according to the law of the State of establishment give rise to deduction, might be refunded. Thus, the interpretation of the

provisions of the Eighth Directive proposed by the French Government would have the effect of restricting the scope of the right which Article 17(3)(a) of the Sixth Directive expressly confers on businesses. As the Court held in Debouche, the Eighth Directive - and hence Article 5 thereof - contains provisions for implementing the Sixth Directive and cannot be construed as a measure amending the latter. Accordingly, it cannot have any bearing on the exercise of the rights conferred by the previous directive. Moreover, Article 5 itself expressly states that, for the purposes of the Eighth Directive, goods and services in respect of which taxes may be refundable shall satisfy the conditions laid down in Article 17 of Directive 77/388/EEC. Consequently, there can be no doubt that the deductibility of the tax must be assessed in accordance with the provisions of the State in which the subsequent transaction linked with the expenditure incurred in the Member State of refund is carried out.

12. What, then, in this case, is the scope of the French legislation, that is to say the legislation of the Member State of refund? On this point I share the view of the Commission, according to which once the percentage of transactions giving rise to deduction has been established, in conformity with the relevant provisions of the Member State of establishment, the Member State in which a refund has been requested may, on the basis of this refundable percentage, exclude those expenses which, under its national legislation, do not give rise to a right to refund. This interpretation is consistent not only with that adopted by the Court in Debouche but also with the meaning of the Sixth Directive which, in Article 17(3)(a), stipulates that value added tax is refundable in so far as the goods and services for which deduction is requested are used for the purposes of transactions which would be eligible for deduction of tax if they had occurred in the territory of the country, that is to say other than those which are not eligible in this respect.

Confirmation of this can be found in the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes. Structure and procedures for application of the common system of value added tax, Article 11(3) of which provides that in the case of a partial deduction ... the amount of the deduction shall be provisionally determined in accordance with criteria established by each Member State and finally adjusted after the end of the year when the pro rata figure for the year of acquisition has been calculated. It will also be noted that, with respect to the application of the second subparagraph of Article 11(2), which also concerns the right to deduction, paragraph 21 of Annex A to the Second Directive expressly authorises Member States to restrict the right to deduction to transactions relating to goods, the supply of which inside the country is taxable.

The subsequent directives on the harmonisation of value added tax do not appear to have affected the scope of these provisions and Articles 2 and 5 of the Eighth Directive should therefore be construed in the light of these principles. Thus, according to the recitals in the preamble to the Eighth Directive, rules are required to ensure that a taxable person established in the territory of one member country can claim for tax which has been invoiced to him in respect of supplies of goods or services in another Member State (second recital) and the Community rules on the harmonisation of refund arrangements must not lead to the treatment of taxable persons differing according to the Member State in the territory of which they are established (fifth recital).

It follows that the percentage in question must be determined on the basis of the portion of the transactions that gives rise to the right to deduction in the Member State in which the taxable person is established; within this percentage, expenses exempted under the provisions of the Member State in which the refund is requested, provisions which in any event should be applicable without distinction to all taxable persons established in the territory of the Community, are not, however, refunded.

13. At the hearing, the French Government claimed that the rejection of the refund applications submitted by Monte dei Paschi di Siena was due to the practical difficulties of calculating the percentage deductible. This percentage, which is determined from the ratio of the total amount,

exclusive of value added tax, of turnover per year attributable to deductible transactions to the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which VAT is not deductible, should have been calculated on the basis of data which were not available at the material time, namely the taxable persons turnover, the amount of the various transactions and the nature of those transactions, for the purpose of assessing the right to deduction or possible exemption. Recourse to the national provisions was made indispensable, and therefore justified, by the difficulty of obtaining these input data.

The respondent in the main proceedings denies that insufficient data were available, pointing out that, in support of its applications and its appeal to the Administrative Appeal Court, it produced all the company's annual income tax returns, with copies certified by the Ufficio IVA de Siena (Siena VAT office), together with vouchers relating to the transactions for which a refund was requested and, more especially, attestations supplied by the chairman and members of the bank's board of auditors. The Commission also disputed the observations of the French Government, noting that a taxable person who requests a refund would have to furnish all the particulars relating to the nature of the transactions carried out and the amount of value added tax; this person would then have to indicate the percentage of the transactions in respect of which value added tax was deductible on the basis, of course, of the law of the State of establishment and provide all the necessary evidence. If the authorities of the State of refund had difficulty calculating the percentage, they could apply to their counterparts in the State of establishment for all the relevant information.

On this point, too, I am inclined to accept the arguments of the Commission. The French Government's proposal for solving the problem of procuring the information necessary to calculate the proportion of tax refundable would lead to denial of the right to refund of value added tax charged in respect of all goods and services used for the purposes of taxable transactions. On the other hand, it is correct to assume that it is the responsibility of the taxable person to supply the necessary information. Under Article 3 of the Eighth Directive, the taxable person is required to attach to the refund application originals of invoices or import documents and, moreover, must 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 value added tax in that State. At the same time, as the Commission points out, there is no reason why, in the event of difficulty in obtaining details of regulations or factual information, the national authorities should not apply to their counterparts in the State of establishment.

Conclusions

14. In the light of the above, I propose that the Court should reply to the questions referred for a preliminary ruling by the Council of State as follows:

Articles 2 and 5 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 must be interpreted as meaning that:

- a taxable person who carries out in the Member State of establishment transactions which are partially exempt has a right to a refund of value added tax for expenses incurred in a Member State other than that of establishment, but only in respect of the percentage of expenses deductible in so far as they are not incurred for carrying out transactions exempt under the law in force in the Member State of establishment;

- this percentage must be determined on the basis of the proportion of transactions in respect of which value added tax is deductible in the Member State of establishment; within this percentage, expenditure exempt under the provisions of the Member State in which refund is requested are not, however, refunded.