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Opinion of Mr Advocate General Jacobs delivered on 14 December 2000. - Syndicat des producteurs indépendants (SPI) v Ministère de l'Economie, des Finances et de l'Industrie. - Reference for a preliminary ruling: Conseil d'Etat - France. - Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Second indent of Article 9(2)(e) of the Sixth VAT Directive - Determination of relevant place for tax purposes - Advertising services - Inclusion of services provided through the intermediary of a third party. - Case C-108/00.

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Opinion of the Advocate-General

1. In these proceedings the Conseil d'État (Council of State), France, asks the Court of Justice to interpret Article 9(2)(e) of the Sixth VAT Directive (hereinafter the Sixth Directive). The issue is whether the notion of advertising services mentioned in that provision applies only to services supplied directly and invoiced by the supplier to a taxable advertiser or whether it applies also to services supplied indirectly to the advertiser and invoiced to a third party (such as an advertising agency) who in turn invoices them to the advertiser.

The relevant legal provisions

Community provisions

2. Under Article 2 of the Sixth Directive, a supply of goods or services effected for consideration by a taxable person acting as such is to be subject to VAT. According to Article 4(1), a taxable person is a person who carries out an economic activity, whatever the purpose or result of that activity. Economic activities include, under Article 4(2), the activities of persons supplying services. The first subparagraph of Article 6(1) defines a supply of services as any transaction which does not constitute a supply of goods.

3. Title VI of the Sixth Directive sets out the rules which determine the place of taxable transactions. Those rules are important in cases where the supply of goods and services affects more than one country. The main purpose of the rules appears from the seventh recital in the preamble to the Sixth Directive:

Whereas the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards supplies of goods for assembly and the supply of services; whereas although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price

of the goods.

4. In pursuit of the objective indicated by that recital, Article 9(1) of the Directive provides that:

The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

5. Article 9(2) sets out a number of exceptions to that rule. Under subparagraph (e):

the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

advertising services,

...

the services of agents who act in the name and for the account of another, when they procure for their principal the services referred to in this point (e).

National provisions

6. Article 9 of the Sixth Directive was incorporated into French law by Articles 28 and 49 of Law No 78-1240 of 29 December 1978. Those provisions have been codified into Articles 259 to 259C of the General Tax Code (Code Général des Impôts). Under Article 259B of that Code:

By way of derogation from the provisions of Article 259, the supply of the following services is deemed to take place in France where they are made by a supplier established outside France and where the recipient is liable to value added tax and has his business headquarters or a fixed establishment to which the service is supplied in France or, failing that, who has his permanent address or usually resides in France:

...

(3) advertising services;

...

The place where such services is supplied is deemed not to be France, even if the supplier is established in France, where the recipient is established outside the European Community or is liable to value added tax in another Member State of the European Community.

7. The French tax authorities' interpretation of Article 259B has developed over time. The interpretation was initially set out in an administrative instruction of 14 December 1983 published in the Bulletin Officiel des Impôts (hereinafter: BOI) 3 A-28-83. That instruction was replaced by an instruction of 25 July 1995 published in BOI 3-A-97 following the judgment in Commission v France. In that case, the Court of Justice had ruled that the interpretation of the notion of advertising services contained in the instruction of 14 December 1983 was contrary to the Sixth Directive in so far as it excluded, among other things, the provision of certain specified services by advertising agencies. In order to comply with the Court's ruling, the French administration issued a

further and more detailed instruction of 5 November 1998 published in BOI 3 A-8-98 (hereinafter: the Instruction). The Instruction provides, in so far as is relevant for these proceedings:

III. Advertising services are supplied directly to a taxable advertiser.

According to the seventh recital of the Sixth Directive defining the place of taxation of advertising services as the place where the person to whom the services are supplied has his principal place of business is justified by the fact that the cost of those services, supplied between taxable persons, is included in the price of the goods. In so far as the person to whom the services are supplied customarily sells the goods or supplies the services advertised in the State where he has his business headquarters, and charges the corresponding VAT to the final consumer, the VAT based on the advertising service should itself be paid by that person to that State (paragraph 15 of the judgment of the Court of Justice of the European Communities in Case C-68/92 Commission v France [1993] ECR I-5881). Consequently, for the purposes of the application of Article 259B of the General Tax Code, operations for the purpose of promoting the sale of goods or services carried out by the supplier of services directly for a taxable advertiser constitute advertising services. The service must thus be provided to the advertiser and invoiced to him.

8. The effect of the final paragraph of Article 259B is that French suppliers of advertising services are not obliged to charge VAT where they supply and invoice their services to a recipient established outside the Community or to a taxable recipient in another Member State. The effect of the above-quoted passage in the Instruction is that that derogation in Article 259B, which reflects Article 9(2)(e) of the Sixth Directive, applies only where services are provided by the supplier directly to a taxable advertiser. (Advertiser refers here, and in the text below, to a recipient of services which have as their purpose the promotion of the products or services sold by that person.) The derogation thus applies to services supplied directly by an advertising agency or by another supplier to the advertiser. It does not however apply, as limited by the Instruction, to advertising services supplied by a supplier established in France, not directly to the advertiser, but indirectly through an advertising agency, wherever the advertiser and the advertising agency are situated.

The facts and question referred

9. The applicant in the main proceedings, Syndicat des producteurs indépendants (hereinafter: SPI), is a professional organisation representing the interests of French film producers, including producers of advertising films.

10. Following a number of disputes between members of SPI and the French tax authorities, SPI challenged the Instruction before the Conseil d'État, claiming that it is contrary to Article 259B of the General Tax Code and Article 9(2)(e) of the Sixth Directive in so far as it excludes from the scope of those Articles the supply of advertising films through advertising agencies.

11. Considering that the proceedings raised a question of interpretation of Community law, the Conseil d'État has asked the Court of Justice pursuant to Article 234 EC:

whether advertising services as mentioned in Article 9(2)(e) of Directive 77/388/EEC of 17 May 1977 are to be understood, as regards operations for the purpose of promoting the sale of goods or services, only as services supplied directly and invoiced by the supplier of services to a taxable advertiser, excluding services of the same nature supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to that advertiser.

12. Written observations have been lodged by SPI, the French Government and the Commission. SPI, the French Government and the Commission were also represented at the hearing held on 9 November 2000.

13. SPI and the Commission call on the Court to answer the referring court's question in the negative. They argue that the French Government's interpretation is contrary to the wording and purpose of Article 9(2)(e), and that it leads to anomalous results in practice. The Commission claims furthermore that the French Government's interpretation is contrary to the principle of neutrality of VAT. The French Government defends its interpretation of Article 9(2)(e) of the Sixth Directive and asks the Court to answer the question referred in the affirmative. It asserts that Article 9(2), as an exception to the general rule in Article 9(1), must be interpreted strictly, that services performed by film companies for advertising agencies differ in nature from services supplied directly to advertisers and that its interpretation therefore complies with the principle of neutrality of VAT.

Analysis

14. The answer to the question referred by the Conseil d'État must take into account the fact that Article 9(2)(e) constitutes a rule of conflict of laws which determines the place of taxation of advertising services and, consequently, delimits the powers of the Member States. It follows, according to the Court's case-law, that "advertising services" is a Community concept which must be interpreted uniformly in order to avoid instances of double taxation or non-taxation which may result from conflicting interpretations. It also follows that there is, contrary to the French Government's assertions, no need for a restrictive interpretation of Article 9(2). Thus, the Court has consistently held that Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether [a transaction] is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1).

15. Article 9(2)(e) refers to advertising services which are performed for customers established outside the Community or ... in the Community but not in the same country as the supplier. In order to give the referring court an answer which will enable it to decide the case in the main proceedings, it is therefore necessary to identify who is the customer and to clarify the meaning of advertising services.

Customers

16. It is necessary, in order to identify who is the customer (preneur) of advertising services, to distinguish between the following situations.

17. The first situation is where a supplier, such as a film producer, agrees, without the intervention of an advertising agency, to supply services and to invoice an advertiser for the services provided. In that situation, there is a single taxable transaction and the customer is the advertiser. Article 9(2)(e) therefore applies on the condition that the services provided can properly be considered as advertising services where the film producer is established in France and the advertiser is established outside the Community or in another Member State.

18. The second situation is where a supplier, such as a film producer, supplies and invoices services directly to an advertiser but does so through the intervention of an advertising agency. In that situation, there are two taxable transactions. The first transaction is the supply of services by the film producer to the advertiser. In that transaction, the customer is the advertiser. It is the advertiser who orders the services through the advertising agency, who makes use of them to promote his products and who pays for them. The advertising agency acts merely as an intermediary between the supplier and the advertiser, and the agency can therefore not be considered to be the customer. It follows, as in the situation mentioned above, that Article 9(2)(e)

applies on the condition that the services provided can properly be considered to be advertising services where the film producer is established in France and the advertiser is established outside the Community or in another Member State. The place of establishment of the advertising agency is irrelevant in this regard. The second transaction is the supply by the advertising agency of a service consisting of its acting as intermediary between the film producer and the advertiser. Here, again, the customer is the advertiser. The place of supply of that transaction is determined by Article 9(2)(e) and, in particular, its last indent which refers to the services of agents who act in the name and for the account of another, when they procure for their principal the services referred to in this point (e).

19. French law, as set out in section III of the Instruction, appears to be in compliance with Article 9(2)(e) as regards the two abovementioned situations. There is however a third situation which creates some difficulty.

20. That situation occurs where, under an agreement between an advertising agency and a supplier (such as a film producer), the latter supplies and invoices its services to the agency which in turn supplies and invoices them to an advertiser. The Court of Justice has not been presented with detailed arguments concerning who is to be considered to be the customer in that situation. At the hearing, the French Government and the Commission appeared to take the view that the indirect supply of services from the film producer to the advertiser must be considered a single transaction in which the customer is the advertiser.

21. In my view, it must however be acknowledged that there are two taxable transactions in that situation. The first is a supply of services from the film producer to the advertising agency. For the purposes of that transaction, the advertising agency is the customer. Thus, Article 9(2)(e) applies on condition that the services provided can properly be considered as advertising services to that transaction where the film producer is established in France and the advertising agency is established outside the Community or in another Member State. The second transaction is a supply of services from the advertising agency to the advertiser. Here the advertiser is the customer. Article 9(2)(e) therefore applies on the condition that the services provided can properly be considered as advertising services where the advertising agency is established in France and the advertiser is established outside the Community or in another Member State.

22. However, under section III of the Instruction, a supply of services from a supplier in France to an advertising agency established outside the Community or in another Member State is not subject to Article 259B of the General Tax Code, and suppliers must therefore collect French VAT on those supplies. In order to determine whether that is compatible with the Sixth Directive, it is necessary to interpret the notion of advertising services in Article 9(2)(e).

Advertising services

23. According to the French Government, an advertiser which contracts directly with a film producer buys an advertising service from that producer. However, an advertising agency which contracts with a film producer does not buy an advertising service. It buys the service of production of a film. Article 9(2)(e) and its second indent therefore applies only where the relevant service is supplied and invoiced directly to the final advertiser. The Instruction, which has the effect of excluding from the scope of Article 259B of the General Tax Code services supplied by film companies to advertising agencies, is thus in accordance with the Sixth Directive.

24. I find that argument unconvincing as a general proposition.

25. The Court of Justice held in Commission v France that in order to determine whether a transaction is a supply of advertising services, it is necessary in each case to take account of all the circumstances surrounding the service in question. The French Instruction appears to preclude such an assessment of the nature of the services supplied by suppliers, such as film companies,

to advertising agencies. It may be added that the Court held, also in Commission v France, that the concept of advertising necessarily entails the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales. Defined in that way, the notion of advertising services is clearly capable of including services which are supplied indirectly to an advertiser through an advertising agency. Moreover, as Advocate General Gulmann stated in his Opinion in that case, it can be assumed that Article 9(2)(e) must apply at least in those cases where a trader resident in one country has made use of an advertising agency resident in another country with a view to organising an advertising campaign and where the various methods employed in that campaign are genuinely intended to promote the sale of the products of the particular trader in question. There is, in such a case, no reason to confer a narrow scope on the concept of advertising services.

26. Thus, while there may be situations in which the services provided by a film producer to an advertising agency cannot be considered to be advertising services within the meaning of Article 9(2)(e), that provision is not restricted to services which are supplied and invoiced by a supplier directly to a taxable advertiser.

27. To restrict Article 9(2)(e) to services which are supplied directly may, moreover, be contrary to the purpose of Article 9(2) of the Sixth Directive.

28. It is clear from the seventh recital in the preamble to the Sixth Directive that the objective of Article 9(2)(e) is to ensure that VAT is paid in the country of the person to whom the services are supplied where the cost of the services is included in the price of the goods. As the Court has stated: The Community legislature therefore considered that, in so far as the person to whom the services are supplied customarily sells the goods or supplies the services advertised in the State where he has his principal place of business, and charges the corresponding VAT to the final consumer, the VAT based on the advertising service should itself be paid by that person to that State. While it may be true, as the French Government suggests, that the cost of an advertising service is not immediately included in the price of the goods and/or services sold by the advertiser where that service is supplied and invoiced to an advertising agency, the cost of the service will as SPI and the Commission point out eventually be included in the price of those goods because the agency will charge the advertiser the cost of the service as well as an agency fee.

29. Finally, Article 9(2)(e) must be interpreted within the context of the system of VAT as a whole and the principles which apply to that system.

30. In that regard, it may be recalled that VAT is a tax on consumption. Although VAT is collected by suppliers of goods and services, it should always be borne by the end consumer. It is in my view doubtful whether the way in which the notion of advertising services as interpreted in the Instruction complies with that principle. An advertising agency which buys an advertising service from a supplier established in France, such as a producer of advertising films, pays VAT on the price of that service in France. That VAT will be added by the advertising agency to the price of the service charged to the advertiser. However, if the advertiser is established outside the Community or in a Member State other than France, he cannot deduct that VAT on his internal VAT return. The advertiser will therefore be left with the burden of VAT unless he can obtain a VAT refund from the competent French authorities. When Article 9(2)(e) of the Sixth Directive was adopted, there was no Community mechanism for obtaining such refunds. A refund mechanism has subsequently been established by the Eighth VAT Directive, but that mechanism is considerably slower and more cumbersome than a direct deduction on the advertiser's internal return.

31. It may also be recalled that VAT is subject to the principle of neutrality. Under that principle, VAT is to be equal for identical products and services and is to remain constantly proportional to the price of goods and services regardless of the number of stages in the commercial chain. The French Government argues that the interpretation of advertising services set out in the Instruction conforms to that principle, because advertising services supplied and invoiced directly to a final

advertiser differ in nature from services consisting in the execution of films supplied to an advertising agency.

32. I find that argument unconvincing. As I have explained above, the distinction between advertising services and other services supplied by film companies does not depend exclusively upon whether those services are supplied to a final advertiser or to an advertising agency. In order to determine whether a service is an advertising service within the meaning of Article 9(2)(e), it is necessary in each case to take account of all the circumstances surrounding the service in question.

Conclusion

33. The Court should, in my opinion, answer the referring court's question as follows:

The second indent of Article 9(2)(e) 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, concerning advertising services, applies not only to services supplied directly and invoiced by the supplier to a taxable advertiser, but also to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser.