Conclusions
OPINION OF ADVOCATE GENERAL
JACOBS
delivered on 12 December 2002(1)

**Case C-438/01**

Design Concept SA
**v**
**Flanders Expo SA**

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1. In these proceedings the Cour de cassation of the Grand Duchy of Luxembourg asks the Court of Justice to interpret Article 9(2)(e) of the Sixth VAT Directive (the Sixth Directive or the Directive). (2) That provision lays down that advertising services supplied to a customer in another Member State are to be subject to value added tax (VAT) in the Member State where the customer is situated. It therefore constitutes an exception to the normal rule, whereby a service is subject to VAT in the Member State where the person supplying the service is situated.
2. The question referred to the Court raises two issues. The first is whether Article 9(2)(e) of the Sixth Directive applies to advertising services supplied indirectly to an advertiser (that is, the party who determines what is to be advertised, and is therefore the ultimate beneficiary of the services) and invoiced to a third party who in turn invoices them to the advertiser. As regards this first issue, the Court has already decided in its recent judgment in the case of *SPI* (3) that the provision in question does apply in such a situation.
3. The issue which falls to be determined in the present case is therefore the second one raised by the referring court, namely whether Article 9(2)(e) of the Sixth Directive applies to advertising services if the recipient of those services does not produce goods in the price of which the cost of those services is to be included.
The relevant legal provisions
4. 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 results 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'.
5. 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 or services affects more than one country. Guidance as to the purposes of the rules is supplied by the seventh recital in the preamble to the Sixth Directive:‘… 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; … 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.'

6. In pursuit of the objective indicated by that recital, Article 9(1) of the Sixth Directive lays down the general rule 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.'

7. Article 9(2) sets out a number of exceptions to that rule. Subparagraph (a) provides that the place of the supply of services connected with immovable property shall be the place where the property is situated. Subparagraph (c) provides, *inter alia* , that the place of supply of services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities shall be the place where the services are physically carried out. 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 facts and question referred

8. Design Concept, a company established in Luxembourg, was commissioned by the Luxembourg Ministry of Economic Affairs to organise display stands for the Ministry at a trade fair, known as HORECA, in Ghent, Belgium. In order to carry out its commission, Design Concept contracted with Flanders Expo, a Belgian company, for the supply of various services, including the construction of two stands at the fair, the cleaning of those stands while the fair was in progress, and the provision of staff to transport the material displayed.

9. When Flanders Expo submitted its invoice for the services which it had provided, it included a sum representing the VAT payable on the transaction in Belgium under applicable Belgian law. Design Concept, however, deducted from its payment the sum representing the VAT. It argued that the services which had been supplied to it were advertising within the meaning of Article 9(2)(e) of the Directive, and that VAT was therefore payable in Luxembourg, the place where it, as the customer, was established.

10. Flanders Expo brought an action in Luxembourg to recover the disputed sum. It denied that its services qualified as advertising for the purposes of Article 9(2)(e). In its view, they fell instead within the general rule laid down by Article 9(1) of the Directive (with the consequence that VAT was payable in Belgium as the supplier's State of establishment), or within the rule concerning services connected with immovable property laid down by Article 9(2)(a) of the Directive (with the consequence that VAT was payable in Belgium as the place where the property was situated), or within the rule concerning services related to cultural, artistic, sporting, scientific, educational, entertainment or similar activities laid down by Article 9(2)(c) (again with the consequence that VAT was payable in Belgium as the place where the services were physically carried out).

11. Both the Tribunal de paix de Luxembourg, at first instance, and the Tribunal d'arrondissement de Luxembourg, on appeal, found that the services supplied were not in the nature of advertising, and therefore upheld Flanders Expo's claim to the Belgian VAT.

12. The case is now before the Cour de cassation of the Grand Duchy of Luxembourg. The Cour de cassation, contrary to the conclusions of the inferior courts, is of the view that the services supplied by Flanders Expo are advertising within the meaning of Article 9(2)(e) of the Sixth Directive.

13. The Cour de cassation nonetheless considers that the applicability of the rule in Article 9(2)(e)

to the circumstances of the case remains in doubt. It notes that, according to the seventh recital, the place for the supply of services should be defined as being the place where the recipient of the services is located ‘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'. In the view of the Cour de cassation, that recital is sufficient to raise a legitimate doubt as to whether it is an essential condition for the application of Article 9(2)(e) that the cost of the advertising services be included in the price of goods.

14. The Cour de cassation considers that the answer to that question affects the outcome of the matter before it, given that the cost of the services in the present case ultimately lies with the Luxembourg State which does not produce goods and therefore cannot pass the cost on in the manner foreseen by the seventh recital.

15. The Cour de cassation has therefore decided to stay the proceedings before it and to ask the Court whether Article 9(2)(e) of the Sixth Directive is applicable in the case of advertising services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser, if the advertiser does not produce goods in the price of which the cost of the services is going to be included.

16. Written observations have been lodged by Design Concept, Flanders Expo, the French Government and the Commission. Submissions were made on behalf of the Greek Government at the hearing, at which Design Concept and the Commission were also represented.

Assessment

17. On a preliminary point, a number of the submissions before the Court concern whether the Cour de cassation is correct to characterise the services at issue in the present proceedings as advertising services within the meaning of Article 9(2)(e) of the Sixth Directive. It is in my view important that the notion of advertising services should not be given an unduly broad interpretation. However, I do not propose to consider the meaning of advertising services in the context of the present reference. The Luxembourg Cour de cassation has concluded that the services at issue in the proceedings before it are in the nature of advertising, and the question which it refers is therefore premissed upon the existence of advertising services. In the absence of any request on the part of the referring court for assistance on that issue, I shall confine my Opinion to a consideration of the two issues on which the Court's guidance has actually been sought.

18. The first issue is whether Article 9(2)(e) of the Sixth Directive applies to advertising services supplied indirectly to an advertiser and invoiced to a third party who in turn invoices them to the advertiser.

19. As all of the parties to the present proceedings observe, that question has already received an affirmative answer from the Court in the *SPI* case, (4) in which it was held that ‘Article 9(2)(e) must be interpreted as applying not only to [advertising] 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'.

20. I shall therefore turn to the second issue raised by the question referred, namely whether Article 9(2)(e) of the Sixth Directive applies to advertising services in circumstances where the advertiser does not produce goods in the price of which the cost of the advertising services is to be included.

21. The French Government maintains that Article 9(2)(e) should not apply in such circumstances, given the reference in the seventh recital to the cost of the service being included in the price of the goods. In support of its position, it cites the following passage from the Court's judgment in *Commission* v *France* : (5) ‘As may be seen from the seventh recital in the preamble to 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. 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. This reasoning is one of the factors which must be taken into account in interpreting the term “advertising services” in Article 9(2)(e) of the Sixth Directive.'

22. In my view, the French Government's argument with regard to the second issue cannot be accepted.

23. It is true that, as appears from the seventh recital, Article 9(2)(e) is in particular intended to ensure that VAT is payable in the State of the recipient of services in cases where the recipient produces goods or services (6) in the price of which the cost of the services which he receives will be included.

24. The rule in Article 9(2)(e) has been shaped in several respects by that objective. First, the provision requires that the recipient of the services which it specifies must be a taxable person. The recipient will thus be involved in an economic activity, and will ordinarily, therefore, pass on the costs of services received, including the VAT payable thereon, to his or her own customers. Secondly, the services specified in the provision are all of a kind which makes them likely to constitute inputs to other economic activities.

25. As the Court has held, the seventh recital is therefore a useful aid in interpreting the meaning of the terms of Article 9(2)(e). (7) The approach advocated by the French Government does not, however, employ the recital to assist in establishing the meaning of a term actually contained in Article 9(2)(e), but as a basis for reading into that provision an additional element which is nowhere to be found in the text of the provision itself.

26. In my opinion it would be necessary, in order to sustain such an approach, at least to demonstrate that the term to be read into the text was unequivocally supported by the purposes underlying the provision and was necessary to give effect to them. I am not convinced that such is the case here for the following three reasons.

27. First, it is important to note that the seventh recital indicates that VAT should be payable in the State where the recipient of services is situated *in particular* where VAT would be passed on by the recipient to its own customers. The recital therefore implies that there may be other valid objectives justifying the payment of VAT in the State of the customer which may be served by Article 9(2)(e). By way of example, a purpose which underlies a number of provisions of the Sixth Directive is the avoidance of distortions of competition resulting from differences in the level at which VAT is set from State to State. By making VAT payable on services in the State of the customer in circumstances where the VAT will not be passed on, a risk of competitive distortion arises. It cannot therefore be assumed that a narrowing of the application of Article 9(2)(e) in the manner suggested by the French Government would not undermine other objectives which the provision was also intended to pursue.

28. Secondly, the approach advocated by the French Government would in any event appear to exclude from Article 9(2)(e) situations which meet the specific objective set out in the seventh recital. By requiring that the cost of the services be passed on in the price of goods or services produced by the advertiser itself, such an approach would prevent Article 9(2)(e) from applying in circumstances such as those in the present proceedings where services are supplied to an intermediate customer, who then includes the cost of those services in the price of the services which it supplies to the advertiser. That approach cannot therefore be justified by reference to the specific objective set out in the seventh recital.

29. Thirdly, such an approach would appear to be in tension with the more general objective of Article 9, which is to avoid instances of double taxation or non-taxation through the establishment of a common scheme for allocating the place of taxation of services. That purpose is apparent from the seventh recital's reference to ‘conflicts concerning jurisdiction as between Member States', and has been confirmed by the Court on numerous occasions. (8) It has been held also to underlie the provisions of Article 9(2). (9)

30. It follows from the status of Article 9 as a scheme for allocating jurisdiction among the Member States that, whatever the more particular purposes justifying its various provisions, they should all

be interpreted in such a way as to ensure the legal certainty upon which the effective operation of such a scheme depends.

31. In addition to any loss of legal certainty which might be thought to result as a consequence of departing from the text of the provision, the approach advocated by the French Government would seem to me to give rise to a number of practical uncertainties in its application.

32. Suppliers of advertising services, as well as the relevant authorities of the Member States, would be required to determine whether in a given case an advertiser could be said to produce goods or services in the price of which the cost of the advertising services would be absorbed. The assessment would be complicated by the fact that advertising services may be supplied to the advertiser indirectly via a third party. In such cases, enquiries would need to extend beyond the supplier's immediate customer. Nor would it necessarily be apparent from the services themselves whether the advertiser produced goods or services in the price of which the cost of the services might be entered, given that, as the Commission points out, an organisation such as a producers' collective may advertise goods without actually producing them itself, and given also the range of services qualifying as advertising for the purposes of Article 9(2)(e). Such practical difficulties bring with them an inevitable risk that authorities will differ in their appreciation of a given case, resulting in either the double taxation or non-taxation of an advertising service.

33. Accordingly, I am of the view that it is not justifiable, having regard to the purposes of Article 9(2)(e), to make its application subject to an additional requirement that the advertising services be supplied to an advertiser who produces goods in the price of which the cost of the advertising services will be entered.

Conclusion

34. It is therefore my opinion that the Court should answer the referring court's question in the following way: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', is applicable in circumstances where the services in question are supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser; it also applies regardless of whether the advertiser to whom the services are supplied produces goods in the price of which the cost of the advertising services will be included.

1 – Original language: English.

2 – 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.

3 – Case C-108/00 [2001] ECR I-2361.

4 – Cited in note 3.

5 – Case C-68/92 [1993] ECR I-5881, paragraph 15.

6 – As is clear from paragraph 15 of the Court's judgment in *Commission* v *France* (reproduced at paragraph 21 of this Opinion), although the seventh recital refers only to the recipient of the services producing goods, the specific objective contained in the recital must be taken also to apply in situations where the recipient of the services is itself a supplier of services.

7 – See paragraph 21.

8 – See Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14 of the judgment; Case 283/84 *Trans Tirreno Express IVA* [1986] ECR 231, paragraph 14; Case C-68/92 *Commission* v *France* , paragraph 14; Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20; and Case C-108/00 *SPI* , paragraph 15.

9 – Case C-108/00 *SPI* at paragraphs 16 and 17 of the judgment.