

Conclusions
OPINION OF ADVOCATE GENERAL
GEELHOED
delivered on 15 May 2003 (1)

Joined Cases C-78/02, C-79/02 and C-80/02

Elliniko Dimosio
v
Maria Karageorgou
Katina Petrova
Loukas Vlachos

(Reference for a preliminary ruling from the Diikitiko Efetio Athinon (Greece))

((Tax paid in error by a non-taxable person and mentioned on the invoice issued by such a service provider))

I ? Introduction

1. In the first question submitted for a preliminary ruling in the three identical cases here at issue the Diikitiko Efetio Athinon (Administrative Court of Appeal, Athens) asks whether the amount which translators, on the recommendation of the Elliniko Dimosio (Greek State), include in their invoices in connection with translation services provided for the State should be regarded as VAT within the meaning 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 (2) (hereinafter the Sixth Directive), given that, on the one hand, they provide their services not as self-employed persons but as employees and, on the other hand, the amount concerned is not calculated on their total earnings, but is considered to have already been included in those earnings, the remuneration actually paid therefore consisting of earnings minus the VAT they include (internal deduction method).

2. The Diikitiko Efetio Athinon also asks whether there can be a departure from the formal principle governing the tax as set out in Article 21(1)(c) of the Sixth Directive where the State, in performing a translation activity in pursuance of its public authority, does not act as a taxable person within the meaning of Article 4(5) of the Sixth Directive with respect to the application of the deduction mechanism, and the said tax cannot be and is not passed on to the private individuals who contract with the State for the translation of documents and, on the other hand, the provider of the service claims the reimbursement of the tax paid to the tax authority after deduction of any input tax in order to avoid the State's enrichment as a result thereof.

II ? Legislative background

A ? Community law

3. Pursuant to Article 2(1) of the Sixth Directive the following is subject to value added tax: the supply of goods or services effected for consideration within the territory of the country by a

taxable person acting as such.

4. Article 4 of the Sixth Directive provides:

1. Taxable person shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity. 2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity....4. The use of the word independently in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability. ...5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions. However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition. In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible. ...

5. Article 17(2)(a) of the Sixth Directive reads as follows:

2. 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

6. Article 18(1)(a) of the Sixth Directive states:

1. To exercise his right to deduct, the taxable person must:

(a) in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3);

7. The formal principle governing the tax is laid down in Article 21(1)(c) of the Sixth Directive: The following shall be liable to pay value added tax:

1. under the internal system:...

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

B ? National law

8. Pursuant to Article 2(1) of Law 1642/1986 on the application of value added tax (A.125), prior to its replacement by Article 1(1)(a) of Law 2093/1992 (A.181), value added tax is payable on, inter alia, the supply of goods and services, provided such supply is for taxation purposes within the territory by taxable persons operating in that capacity.

9. Pursuant to Article 3(1) of Law 1642/1986, prior to its replacement by Article 1 of Law 2093/1992, every physical or legal person or corporate body, whether national or foreign, shall be subject to the tax, provided they are engaged in independent economic activity, irrespective of the place of establishment, the purpose or the result of such activity. Salaried employees and other physical persons bound to their employer by a contract of employment or any other legal ties creating the relationship of employer and employee as regards conditions of employment, remuneration and employer's liability shall not be regarded as carrying on an independent economic activity.

10. Moreover, pursuant to Article 23(1) of the same law, prior to its amendment by Articles 1(34) and 2(18) of Law 2093/1992, taxable persons shall be entitled to deduct from the tax payable on the supply by them of goods or services the tax levied on goods and services supplied to them

11. Pursuant to Article 25(1) of the same law, prior to its amendment by Article 1(38) of the

abovementioned Law 2093/1992, The right to deduct tax may be exercised on condition that taxable persons liable to tax are in possession of: (a) an invoice or other document constituting evidence of an invoice in respect of the goods supplied or services provided by them, (b)

12. Finally, Article 28(1) of Law 1642/1986, prior to its replacement by Article 1(42) of the abovementioned Law 2093/1992, provides that: In respect of the supply of goods and services, the following shall be liable to the tax: (a) taxable persons established in the territory in respect of activities performed by those persons, (b) ... , (c) ... , (d) any other persons whatsoever who mention the tax on invoices or on other similar documents issued by them, (e)

III ? Facts of the main proceedings and questions referred for a preliminary ruling

13. Apart from a few minor differences that have no bearing on the material assessment, the three joined cases are identical as regards facts and proceedings. I will therefore confine myself to a generalised description of the facts and of the procedure adopted.

14. Mrs Karageorgou (Case C-78/02), Mrs Petrova (Case C-79/02) and Mr Vlachos (Case C-80/02) (hereinafter the translators) are employed as translators from Greek into English or from Greek into German by the Translation Department of the Ministry of Foreign Affairs.

15. After submitting provisional VAT statements and a final VAT statement for 1992 and/or 1993 in respect of this activity to the Head of the Dimosia Oikonomiki Ypiresia (Financial Services Directorate; hereinafter the DOY) at Cholargos, the translators retracted these statements, requesting the reimbursement of the VAT for which they were not liable.

16. In support of these requests for reimbursement the translators all contended that the statements concerned were based on an error in law, in that the remuneration which they had received as translators was not subject to VAT. In particular, they pointed out that throughout 1992 and/or 1993 they had been in an employer-employee relationship with the Ministry of Foreign Affairs with regard to their conditions of employment and remuneration since, on the one hand, they had not determined their remuneration themselves and, on the other hand, the Ministry of Foreign Affairs was liable towards third parties for any acts or omissions on their part as translators. Further, they contended that the VAT which, according to their statements for 1992 and/or 1993, was paid on their gross earnings was not passed on by them, given that the natural and legal persons using the services of the Translation Department of the Ministry of Foreign Affairs do not include VAT in the total amount which they pay to the Ministry of Foreign Affairs for the translation of their official documents and so do not pay VAT.

17. The Head of the DOY at Cholargos rejected the requests for reimbursement on the grounds that the conditions of employment applicable to translators were different from those applicable to other salaried employees and that the VAT was mentioned in the statements concerning the services provided for the Ministry of Foreign Affairs. They were not therefore entitled to reimbursement.

18. In consecutive judgments the President of the Diikitiko Protodikio Athinon (Athens Administrative Court of First Instance) allowed the translators' applications and declared the requests for the retraction of the VAT statements which they had submitted for 1992 and/or 1993 to be well founded, set aside the negative decisions of 9 February 1995 of the Head of the DOY at Cholargos and ordered that the amount of tax unduly paid by the translators be repaid to them. These judgments were partly based on the finding that the translators work as organs of the State, which has sole liability for their acts and omissions, given that the translations provided by them are public documents. The President of that court also ruled that the translators undertake their activities under an employer-employee relationship with the State as regards the manner in which they perform their work and their remuneration. The income from this activity cannot therefore be subject to VAT.

19. The Greek State appealed against these rulings first to the President of the Diikitiko Efetio Athinon. Its appeals were based, inter alia, on the argument which had been advanced in all the cases at first instance, namely that the translators, irrespective of the nature of their work, were liable to pay the contested tax in compliance with Article 28(1)(d) of Law 1642/1986 on the ground that they had mentioned VAT in the statements issued in respect of the services they provided for

the period in question (1992 and/or 1993).

20. The President of the Diikitiko Efetio Athinon dismissed these appeals by the Greek State as unfounded and upheld the judgments at first instance and the reasoning on which they were based. However, it failed to examine the ground of appeal cited by the Greek State in the three cases regarding the fact that the translators were liable to pay the contested tax because they had mentioned it on the invoices which they had issued in connection with the services provided in the period in question.

21. The Greek State then appealed against these judgments to the Simvoulío tis Epikratias (Council of State) (Greece) and sought to have them set aside, citing the aforementioned omission.

22. The Greek Council of State definitively held in its rulings that the translators were not liable to VAT in respect of the activities which they had undertaken for the Ministry of Foreign Affairs in a relationship of employer and employee. However, it set aside the judgments of the Diikitiko Efetio Athinon in so far as that court had omitted in the various cases to examine the ground which concerned the mention of VAT on the invoice. It took the view that this ground of appeal was essential and that the appellate court had wrongly omitted to consider it. The cases were therefore referred back to the Diikitiko Efetio Athinon for the purpose of partial reappraisal.

23. The Diikitiko Efetio Athinon notes that there is a difference of opinion within the Greek Council of State over the interpretation of Article 28(1)(d) of Law 1642/1986, another chamber of the Greek Council of State having delivered in a case similar to the three here under consideration a judgment which differed from that delivered by the chamber of the Greek Council of State which has considered the present cases. As the interpretation of this article of the law is linked to the relevance of some provisions of the Sixth Directive, the Diikitiko Efetio Athinon believes it necessary for a final judgment on the undecided issue in the present three cases not to be delivered for the time being and for the following questions to be referred to the Court of Justice of the European Communities for a preliminary ruling:

(a) Is it possible to characterise as VAT, within the meaning of the provisions of the Sixth VAT Directive (77/388/EEC), the amount mentioned on an invoice by a person who provides services to the State as a salaried employee, when the person providing these services mistakenly considers that he is providing services to the State as a self-employed person whilst, in reality, he is an employee and, on the recommendation of his employer, charges VAT on the invoices issued by him and not on his total earnings received from the State, which in law constitute the tax basis of assessment to VAT, subsequently collected from his earnings, but where the amount thereof is determined on the earnings by means of an internal deduction method and the earnings are regarded as containing the amount of VAT owed, while the State reduces the amount of legitimate earnings paid to that person by the element of VAT they are calculated to contain?

(b) Can there be a departure from the formal principle governing the tax as set out in Article 21(1)(c) of the Sixth VAT Directive (77/388/EEC) (that is to say, where VAT is mentioned on the invoice or other document serving as an invoice, such tax is payable to the State), where the State, in performing that activity in pursuance of its public authority, is under Article 4(5) of the above directive not subject to tax, so as to render the mechanism of deductions inapplicable thereto, and the said tax cannot be and is not passed on to the end consumer (namely, the individual who contracts with the State for the translation of documents), the provider of services being entitled to reimbursement of the tax paid to the tax authority after deduction of any input tax in order to avoid the State's enrichment as a result thereof?

24. The translators, the Greek Government and the Commission have submitted written comments. Mrs Karageorgou (Case C-78/02), the Greek Government and the Commission explained their views in greater depth orally at the Court's hearing of 20 March 2003.

IV ? Assessment

25. The first question submitted by the national court seeks to establish whether the amount mentioned in error on the invoice as VAT must be regarded as VAT in a situation where the service provider concerned wrongly believes that he has provided services for the Greek State as

a self-employed person, whereas those services are in fact provided in a relationship of employer and employee. The said amount is calculated by the internal deduction system. This means that it is assumed that the legitimately determined earnings already include the VAT owed, the amount actually paid out therefore being the legitimately determined earnings minus the amount of VAT.

26. To determine whether the amount concerned should be regarded as VAT, it should first be said that in respect of the service they provide for the Greek State the translators are subject to the provisions on VAT.

27. It is clear from Article 2 of the Sixth Directive that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to VAT.

28. Article 4 of the Sixth Directive then defines the persons who are to be regarded as taxable persons within the meaning of that directive. The basic requirement set out in Article 4(1) is that they must be persons who independently carry out an economic activity. Article 4(4) then states that the term independently excludes not only employed persons from the tax but also persons who are bound by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

29. The Greek Government has pointed out that Greek case-law obviously does not give a clear ruling on the nature of the ties between the translators and the Greek Ministry of Foreign Affairs. The translators and the Commission, on the other hand, point out that it has in fact already been determined in the main proceedings that the translators undertake their activities in a relationship of employer and employee.

30. It is settled case-law that within the framework of the procedure relating to preliminary rulings as set out in Article 234 EC the Court is empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court puts before it. It is not, in other words, for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver. (3)

31. As the Commission and the translators have contended, it has been irrevocably established within the national legal system that the translators are working in an employer-employee relationship with the Ministry of Foreign Affairs. This relationship is evident, *inter alia*, from the fact that they are not free to determine their remuneration and conditions of employment, that the Ministry is liable to third parties for the quality of the translations and that the translators are subject to an internal system of sanctions with respect to compliance with their obligations.

32. In these circumstances it is clear that the translators do not perform an economic activity as self-employed persons and are not therefore taxable persons within the meaning of Article 4(1) of the Sixth Directive. Consequently, the services they provide do not fall within the scope of the Sixth Directive.

33. It follows from this that, as the amount mistakenly mentioned on the invoice issued by the translators cannot be regarded as VAT, the first question submitted by the national court must be answered in the negative.

34. The conclusion that the situation described in the first question submitted for a preliminary ruling does not fall within the scope of the Sixth Directive means that the second question no longer serves any purpose. Strictly speaking, it does not therefore need to be answered to enable the dispute to be resolved. None the less, I will comment on it as follows for the sake of completeness, though superfluously.

35. In the second question it submits for a preliminary ruling the national court asks whether the formal principle governing the tax as set out in Article 21(1)(c) of the Sixth VAT Directive must be declared inapplicable where under Article 4(5) of the Sixth Directive the authorities are deemed not to be taxable persons, the tax has not been passed on to the end consumer and the provider of the service calls for the reimbursement of the VAT mistakenly paid. Or, conversely, where the State acts as a non-taxable provider of a service, are amounts which are formally (though mistakenly) mentioned as VAT on the invoice within the meaning of Article 21(1)(c) of the Sixth

Directive nevertheless not owed as VAT?

36. The Sixth Directive does not explicitly provide for a situation in which VAT has been mistakenly included on an invoice when it is not owed. This means that, until this gap has been filled by the Court, it is for the Member States to find a solution in this regard. (4) In the judgment in *Genius Holding*, which concerned the right to deduct VAT mentioned on an invoice without being owed, the Court also indicated that ? as a result of the need to ensure the neutrality of VAT ? it is for the Member States to 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.

(5)

37. In the judgment in *Schmeink & Cofreth* the Court added that VAT which has been improperly invoiced can be adjusted without such adjustment being made conditional upon the issuer of the relevant invoice having acted in good faith where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss in tax revenues. (6)

38. These observations do not, however, lead to a separate, definite answer to the second question referred for a preliminary ruling. As I have already concluded above that the situation underlying the questions submitted for a preliminary ruling does not fall within the scope of the Sixth Directive, the loss of tax revenue is not under discussion and the question of the good faith of the issuer of the invoice is irrelevant. What is relevant in these circumstances, on the other hand, is whether or not the principle laid down in Article 21(1)(c) must be declared inapplicable.

V ? Conclusion

39. Having regard to the above, I propose that the Court should answer the first question submitted by the Diikitiko Efetio Athinon as follows: The amount mentioned on an invoice by a person who provides services to the State as a salaried employee is not VAT within the meaning 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 where the person providing these services mistakenly considers that he is providing services to the State as a self-employed person whilst, in reality, he is an employee and, on the recommendation of his employer, charges VAT on the invoices issued by him and not on his total earnings received from the State, which in law constitute the tax basis of assessment to VAT, subsequently collected from his earnings, but where the amount thereof is determined on the earnings by means of an internal deduction method and the earnings are regarded as containing the amount of VAT owed, while the State reduces the amount of legitimate earnings paid to that person by the element of VAT they are calculated to contain.

1 – Original language: Dutch.

2 – OJ 1977 L 145, p. 1.

3 – See, inter alia, the judgments in Case C-30/93 *AC-ATEL Electronics* [1994] ECR I-2305, paragraphs 16 and 17, Case C-326/96 *Levez* [1998] ECR I-7835, paragraphs 25 and 26, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraphs 31 and 32.

4 – Judgment in Case C-454/98 *Schmeink & Cofreth* [2000] ECR I-6973, paragraphs 48 and 49.

5 – Judgment in Case C-342/87 *Genius Holding* [1989] ECR 4227, paragraph 18.

6 – Judgment in *Schmeink & Cofreth* (cited in footnote 4, paragraphs 60 to 63).