OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 17 June 2008 (1)

Case C?291/07

Kollektivavtalsstiftelsen TRR Trygghetsrådet

v

Skatteverket

(Reference for a preliminary ruling from the Regeringsrätten (Sweden))

(Taxation – VAT – Council Directives 77/388/EEC and 2006/112/EC – Place of supply – Consultancy services – National foundation which carries out both economic and other activities which do not fall within the scope of Directives 77/388 and 2006/112)

1. By the present reference for a preliminary ruling, the Regeringsrätten (Supreme Administrative Court) (Sweden), asks the Court of Justice to interpret Articles 9(2)(e) and 21(1)(b) of the Sixth VAT Directive (2) as well as Articles 56(1)(c) and 196 of Directive 2006/112 (3) (collectively 'the relevant provisions'). The case in the main proceedings relates in part to accounting periods to which the provisions of the Sixth Directive are applicable and in part to accounting periods to which the provisions of Directive 2006/112 apply.

2. The case concerns a Swedish foundation which carries out both economic and other activities and which intends to purchase consultancy services from Denmark. The referring court wishes to know whether, for the purposes of applying the relevant provisions, the foundation is a taxable person even though the purchase is to be made in respect only of the part of its activities which falls outside the scope of the Directives.

I – **Legal framework**

A – *Community law*

3. Under Article 2(1) of the Sixth Directive, the following is to be subject to VAT: '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(1) of the Sixth Directive provides that a taxable person means 'any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'. Article 4(2) reads as follows: 'economic activities ... shall comprise all activities of producers, traders and persons supplying services ...'.

5. Pursuant to Article 9 of the Sixth Directive which concerns the place of supply of services:

‘1. 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.

2. However:

…

(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:

…

– services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information,

…’

6. Article 21(1)(b) of the Sixth Directive provides that the following are to be liable to pay VAT:

‘persons to whom services covered by Article 9(2)(e) are supplied and carried out by a taxable person resident abroad. However, Member States may require that the supplier of services shall be held jointly and severally liable for payment of the tax.’

7. Under Article 2(1)(c) of Directive 2006/112, the following type of transaction is to be subject to VAT: ‘the supply of services for consideration within the territory of a Member State by a taxable person acting as such.’

8. Article 9(1) of Directive 2006/112 provides:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including … activities of the professions, shall be regarded as “economic activity” …’

9. Under Article 56(1) of Directive 2006/112:

‘The place of supply of the following services to customers established outside the Community, or to 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 for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides:

…

(c) the services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the provision of information;

…’

10. Finally, Article 196 of Directive 2006/112 provides:

‘VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied …’

B – *National law*

11. Pursuant to Paragraph 1 of Chapter 1 of the mervärdesskattelagen (1994:200) (Law on VAT; ‘ML’), VAT is to be paid on turnover made within the country on goods and services which are subject to taxation and supplied as part of a professional activity. (4)

12. Pursuant to Paragraph 7 of Chapter 5 of the ML, certain specified services, including consultancy services, supplied from another Member State are regarded as supplied within the country if the purchaser is a trader who has his place of business in Sweden or a fixed establishment for which the service is supplied, or, if the trader does not have such a place of business or fixed establishment in Sweden, the place where he has his permanent address or usually resides. If the supplier of the taxable consultancy services within the country is a foreign company, it is the purchaser, pursuant to Paragraph 2 of Chapter 1 of the ML, who is liable to pay the VAT. (5)

13. There is no definition in the ML of the term ‘trader’. Under Paragraph 1 of Chapter 4 of the ML, ‘professional activity’ is defined as an activity which constitutes economic activity pertaining to business and remuneration for transactions undertaken as part of that activity which, in one tax year, exceed SEK 30 000. It is clear from Paragraph 1 of Chapter 13 of the inkomstskattelagen (Law on income tax) that economic activity refers to gainful activity carried out independently in the course of a profession.

II – **Facts and procedure and the question referred for a preliminary ruling**

14. The case in the main proceedings concerns a foundation formed on the basis of collective agreements, the Kollektivavtalsstiftelsen TRR Trygghetsrådet (Restart – the Council for Redundancy Support and Advice) (‘TRR’), which was formed in 1994 from the Svenska Arbetsgivareföreningen (Confederation of Swedish Enterprise; now Svenskt Näringsliv) and the Privattjänstemannakartellen (Federation of Salaried Employees in Industry and Services).

15. According to its statutes, TRR’s aims are, on the one hand, to pay compensation for unemployment and to promote measures to facilitate the transfer to new employment of employees who, for specific reasons, have been made unemployed or who run that risk and, on the other hand, to give advice and assistance to companies in or likely to be in a situation of over-manning and to promote company development in the field of human resources. The conditions for TRR’s activity are regulated in more detail by an existing contract between Svenskt Näringsliv and Privattjänstemannakartellen, the Omställningsavtal (agreement on transition of employment).

16. The activities are financed through the payment, by employers who are bound by the contract, of a fee corresponding to a proportion of the pay of the employees covered by the contract. Employers who are bound by the contract under a ‘side contract’ pay a fixed yearly fee. In addition to the activity carried out under the Omställningsavtal, TRR is registered for VAT in respect of the supply of services in connection with company outsourcing. The activities which are

subject to tax are stated to amount to 5% of TRR's total activity.

17. TRR intends to purchase consultancy services from, inter alia, Denmark, which will be used exclusively in the context of the activity carried out by the foundation on the basis of the Omställningsavtal. In order to clarify the tax consequences of that purchase, TRR sought a preliminary decision from the Skatterättsnämnden on whether its activity on the basis of the Omställningsavtal is professional in nature and whether it is a trader for the purposes of Paragraph 7 of Chapter 5 of the ML.

18. The Skatterättsnämnden answered the questions by preliminary decision of 3 March 2006, stating: (i) TRR is not to be regarded as providing services as part of a professional activity in respect of the activities under the Omställningsavtal and TRR is to be regarded as a trader for the purposes of Paragraph 7 of Chapter 5 of the ML.

19. The TRR has appealed against the preliminary decision, claiming that the Regeringsrätten should amend the preliminary decision and declare that TRR is not a trader for the purposes of Paragraph 7 of Chapter 5 of the ML. The Skatteverket (Local Tax Board) contends that the Regeringsrätten should confirm the preliminary decision.

20. In support of its action, TRR has submitted, inter alia, that registration for VAT does not of itself mean that the registered party is always to be regarded as a trader for the purposes of Paragraph 7 of Chapter 5 of the ML. When making purchases for activities which fall outside the scope of the Sixth Directive, TRR is not a trader as referred to in that provision. The corresponding provision in the Sixth Directive, Article 9(2)(e), does not refer to a trader but to a taxable person.

21. The Regeringsrätten considers that the case before it requires an interpretation of the Community law terms 'taxable person' and 'person liable for tax' where certain provisions of the Sixth Directive and of Directive 2006/112 are to be applied. The referring court notes that the meaning of the term 'taxable person' in the Sixth Directive has been interpreted by the Court in many judgments. However, there is no case-law on how the term is to be understood for the purposes of applying Article 9(2)(e) of that directive in a situation such as that under consideration in the present case.

22. On the view that the relevant provisions of the Sixth Directive and of Directive 2006/112 are unclear and since it appears that the issue has not yet been addressed by the Court, the Regeringsrätten has decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Articles 9(2)(e) and 21(1)(b) of the Sixth Directive and Articles 56(1)(c) and 196 of [Directive 2006/112] to be interpreted as meaning that a person who purchases consultancy services from a person liable to tax in another [Member State], [where the former] carries out both an economic activity and also an activity which falls outside the scope of the Directives, is to be regarded as a taxable person … where those articles are applied, even though the purchase was made solely in respect of the latter activity?'

23. Written observations have been submitted by the Skatteverket, by the German, Greek, Italian and Polish Governments and by the Commission. No hearing has been requested by the parties, and none has been held.

III – **Assessment**

A – *Main arguments of the parties*

24. TRR has not submitted written observations to the Court.

25. In the Skatteverket's view, Article 9(2)(e) of the Sixth Directive and Article 56(1) of Directive 2006/112 do not require the customer to be acting as a taxable person when he makes a purchase or to be making the purchase as part of economic activities. Furthermore, it is in keeping with the objective of both directives that, for the purposes of the relevant provisions, it is immaterial whether or not the customer is acting as a taxable person.

26. The Skatteverket contends that, for the application of the relevant provisions, a taxable person must be treated as such, independently of the aim of the purchase of services. Thus, in the case of the services purchased by TRR in circumstances such as those of the main proceedings, the supply must be considered to be carried out in Sweden. TRR is therefore required to declare and pay the VAT to the Swedish exchequer. However, the supply of services unrelated to TRR's economic activity does not give rise to a right of deduction in respect of the VAT.

27. The German, Polish and Greek Governments as well as the Commission, have put forward arguments to the same effect as those of the Skatteverket. In principle, they contend that the relevant provisions are to be interpreted as meaning that a customer making a purchase of consultancy services from a person liable to tax in another Member State where the former carries out both an economic activity and an activity which falls outside the scope of the Directives must be regarded as a taxable person, even where that purchase is made solely in respect of the latter activity.

28. However, the Italian Government submits in essence that the relevant provisions must be interpreted as meaning that a customer making a purchase of consultancy services from a taxable person established in another Member State where the former carries out both an economic activity and an activity which falls outside the scope of the Directives must be considered as a final consumer of that supply of services where that purchase is made solely in respect of activities falling outside the scope of the Directives.

B – *Appraisal*

29. By its question, the referring court asks whether the relevant provisions are to be interpreted as meaning that a person who purchases consultancy services from a person liable to tax in another Member State where the former carries out both an economic activity and also an activity which falls outside the scope of the Directives is to be regarded as a taxable person, even where the purchase is made solely in respect of the latter activity.

30. Given the almost identical wording of the relevant provisions of the two Directives and in the interests of clarity, reference will be made here to the Sixth Directive alone. (6)

31. Under Article 4(1) of the Sixth Directive, 'taxable person' means any person who independently carries out one of the economic activities referred to in Article 4(2). 'Economic activity' is defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services.

32. It is settled case-law that Article 4 of the Sixth Directive gives VAT a very wide scope, covering all stages of production, distribution and the provision of services. (7) In addition, it is also well established that, in view of the purpose of the Sixth Directive ? which seeks in particular to found a common system of VAT upon a uniform definition of 'taxable persons' ? that status must be assessed solely on the basis of the criteria set forth in Article 4 of that Directive. (8)

33. Thus the Court has held that a person who carries out an economic activity for the purposes of Article 4 of the Sixth Directive is a taxable person, even if that economic activity is an ancillary one. (9) A person may be considered a taxable person under Article 4 of the Sixth Directive even where, as in the case of TRR, a predominant part of his activity does not fall within the scope of that directive.

34. The Court noted in *Gillan Beach* that 'Article 9 of the Sixth Directive contains rules for determining the place where services are deemed to be supplied for tax purposes. Whereas Article 9(1) lays down a general rule on the matter, Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied. The object of those provisions is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation.' (10)

35. The Court went on to state, in the same judgment, that '[i]t is appropriate also to note that, in respect of the relationship between Article 9(1) and (2) of the Sixth Directive, the Court has held that Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether that situation is covered by one of the instances mentioned in Article 9(2) of that directive. If not, it falls within the scope of Article 9(1).' (11)

36. It follows that Article 9(2) of the Sixth Directive, not being an exception to the rule in Article 9(1), is not to be interpreted narrowly.

37. Additionally in *Gillan Beach*, the Court held that '[i]n interpreting a provision of Community law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objects of the rules of which it is part'. (12) Thus, according to the Court, it must be borne in mind that Article 9(2) of the Sixth Directive is a rule of conflict which determines the place of taxation of services and, consequently, delimits the powers of the Member States. I note here that it follows that 'services of consultants' is a Community concept which must be interpreted uniformly in order to avoid instances of double taxation or non-taxation. (13)

38. It should be noted that Article 9(2)(e) of the Sixth Directive does not specify whether or not a taxable person purchasing services must make that purchase in respect of his economic activity: (14) for that matter, there is nothing in that provision to suggest that such a fact should assume any importance for the purposes of its application.

39. However, as the referring court rightly points out, Article 2(1) of the Sixth Directive explicitly states that VAT is payable on the supply of goods or services effected for consideration within the territory of the country by a taxable person 'acting as such'. Furthermore, Article 17(2) of the Sixth Directive clearly provides that the taxable person's right of deduction of input tax is recognised in so far as the goods and services are used for the purposes of his taxable transactions. (15)

40. Nevertheless, while Articles 2(1) and 17(2) of the Sixth Directive specifically refer to the taxable person 'acting as such' or to services being used for the purposes of taxable transactions, Article 9(2)(e) of that directive makes no such specific reference. In my view this is by no means a (legislative) oversight on the part of the Community legislature. Rather, the absence in Article 9(2) of any reference to economic activity, to a taxable person acting as such or to taxable transactions means that, for the purposes of determining the place of supply of services, the fact that the customer additionally undertakes activities which fall outside the scope of the Sixth Directive is not a bar to the application of that provision. (16)

41. Furthermore, the above interpretation of the relevant provisions is in line with the interests of simplicity of administration (of the rules on the place of supply of services) and ease of

collection, as well as the prevention of tax avoidance. (17) Indeed, as the Skatteverket correctly points out, if the customer of services supplied were required to be a taxable person acting as such or if the services had to be used for the purposes of his taxable transactions, the determination of the place of supply of services would in many cases be much more difficult, both for companies and for the fiscal authorities of the Member States. (18)

42. Moreover, with regard to the practicality (19) of such a construction of the relevant provisions, in the case of a person purchasing consultancy services the tax is charged at the stage of that person's VAT return which he submits to the tax administration in the Member State where he is established. Being a taxable person, he is bound to be registered in that Member State already for the purposes of VAT returns. Moreover, if those services are used in respect of his economic activity, the purchaser may avail himself of his right of deduction of input tax. The supplier of the services, on the other hand, need only demonstrate that the person purchasing them is a taxable person. (20)

43. Finally, in my view such a reading of the relevant provisions is dictated also by the principle of legal certainty, as the rules on the place of supply of services must be predictable to traders. This principle applies with particular rigour to rules which have fiscal consequences, so that individuals can identify their obligations under such rules. (21)

44. Moreover, that interpretation should be conducive to reducing the burden on traders operating across the internal market. And that, in turn, will help to facilitate the free movement of goods and services, which, as I recall, is one of the general aims of the common system of VAT. (22)

45. Before concluding, I would briefly mention that in the light of the above considerations it would appear that, in its construction of the relevant provisions, (23) the Italian Government has not taken due account of the purpose of those provisions.

46. Last but not least, turning to Article 21(1)(b) of the Sixth Directive, which also figures in the question referred, suffice it to note that that provision merely states that persons to whom services covered by Article 9(2)(e) of the Sixth Directive are supplied and carried out by a taxable person resident abroad are liable to VAT. Therefore where the conditions laid down in Article 4 of the Sixth Directive as well as other conditions under Article 21(1)(b) are met, such a person is accountable for VAT as regards the services which he has purchased, whether or not these are effected solely in respect of the activity which falls outside the scope of the Directives.

IV – **Conclusion**

47. I am therefore of the opinion that the Court should give the following answer to the question referred by the Regeringsrätten:

With a view to determining the place of supply of services, Articles 9(2)(e) and 21(1)(b) 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 and Articles 56(1)(c) and 196 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax are to be interpreted as meaning that a person who purchases consultancy services from a person liable to tax in another Member State, where the former carries out both an economic activity and an activity which falls outside the scope of those two directives, is to be regarded as a taxable person for the purposes of applying those provisions, even where the purchase is made solely in respect of the latter activity.

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) (‘the Sixth Directive’).

3 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (‘Directive 2006/112’). Jointly, the Sixth Directive and Directive 2006/112 will be referred to as ‘the Directives’. With effect from 1 January 2007, the Sixth Directive was repealed and replaced by Directive 2006/112.

4 – The provision is intended to implement Article 2(1) of the Sixth Directive.

5 – The corresponding parts of Articles 9(2)(e) and 21(1)(b) of the Sixth Directive have been implemented by those provisions.

6 – In essence, Articles 2(1), 4, 9(2)(e) and 21(1)(b) of the Sixth Directive correspond to Articles 2(1), 9, 56(1)(c) and 196 of Directive 2006/112 respectively.

7 – See, inter alia, Case C?186/89 *Van Tiem* [1990] ECR I?4363, paragraph 17; Case C?305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I?6729, paragraph 42; and Case C?25/03 *HE* [2005] ECR I?3123, paragraph 40.

8 – See *HE*, cited in footnote 7, paragraph 41 and the case-law cited.

9 – Ibid., paragraph 42.

10 – See Case C?114/05 [2006] ECR I?2427, paragraph 14, citing Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C?327/94 *Dudda* [1996] ECR I?4595, paragraph 20; Case C?167/95 *Linthorst, Pouwels en Scheren* [1997] ECR I?1195, paragraph 10; and Case C?452/03 *RAL (Channel Islands) and Others* [2005] ECR I?3947, paragraph 23.

11 – See *Gillan Beach*, cited in footnote 10, paragraph 15 and the case-law cited.

12 – Ibid., paragraph 21, citing Case C?17/03 *VEMW and Others* [2005] ECR I?4983, paragraph 41.

13 – With reference to ‘similar activities’, see *Gillan Beach*, cited in footnote 10, paragraph 20 and the case-law cited. As regards ‘advertising services’, see Case C?68/92 *Commission* v *France* [1993] ECR I?5881, paragraph 14; Case C?73/92 *Commission* v *Spain* [1993] ECR I?5997, paragraph 12; and the Opinion of Advocate General Jacobs in Case C?108/00 *SPI* [2001] ECR I?2361, point 14.

14 – That is to say, activity subject to tax.

15 – See Case C?378/02 *WZV* [2005] ECR I?4685, paragraph 32 and the case-law cited.

16 – I would add that, as is clear from the above, the purpose of Article 9(2) of the Sixth Directive is different from the aims of Articles 2(1) and 17(2).

17 – In view of my interpretation of the relevant provisions, in case of doubt with regard to the risk of tax avoidance, I would note that Articles 21 and 22(7) of the Sixth Directive permit the tax authorities of the Member States to take the necessary measures to counter that risk. See, to that effect, *Dudda*, cited in footnote 10, paragraph 32.

18 – I also agree that if, contrary to my interpretation above, the relevant provisions were to be considered as requiring such obligations the interests of simplicity of administration of the rules and ease of collection would be undermined in situations where the purchase of services is made for both categories of activities carried out by TRR. The relevant provisions do not give any guidance in respect of how one would have to proceed with the requisite apportionment.

19 – This issue is closely linked with the one in the previous paragraph. If the allocation of tax jurisdiction is too impractical, transactions which are otherwise taxable may escape taxation.

20 – As the Skatteverket rightly points out, such a regime allows a provider of services, such as consultancy services, to avoid having to register for the purposes of VAT in every Member State where his clients are established.

21 – See, in this respect, the Opinion of Advocate General Fennelly in *Dudda*, cited in footnote 10, point 32; referring to Case C?30/89 *Commission* v *France* [1990] ECR I?691, paragraph 23; and the Opinion of Advocate General Cosmas in Case C?231/94 *Faaborg-Gelting Linien* [1996] ECR I?2395, point 12.

22 – In the case before the referring court, the relevant facts predate the entry into force of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11). Article 2 of Directive 2008/8 provides that, as of 1 January 2010, Article 43 of Directive 2006/112 is to read as follows: ‘For the purpose of applying the rules concerning the place of supply of services: 1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) *shall be regarded as a taxable person in respect of all services rendered to him*’ (emphasis added).

23 – See point 28 of the present Opinion.