OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 12 March 2009 (1)

Case C?566/07

Staatssecretaris van Financiën

v

Stadeco BV

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Sixth VAT Directive – Tax mentioned on an invoice for a service not subject to tax at the place where the service provider is established – Tax refund – Correcting the invoice)

I – **Introduction**

1. The Hoge Raad der Nederlanden has referred two questions on the interpretation of the Sixth VAT Directive (2) to the Court. The first question seeks to determine whether a taxable person is liable for the VAT he has mentioned in an invoice, even though the service invoiced was not actually subject to taxation at the place where the issuer is established. The following question seeks to determine whether any tax refund can be made subject to the requirement that the incorrect invoice be replaced by a corrected invoice.

2. This was demanded by the Netherlands tax authorities in the main proceedings. The underlying national rules are intended to prevent the recipient of the invoice from deducting the incorrectly mentioned VAT even though the issuer of the invoice has not paid it or has had it refunded to him. In the present case, however, there is no danger of this, because the recipient of the service was a State authority not entitled to deduct VAT. The question therefore arises whether the application of the legislation at issue in such a case goes beyond what is necessary in order to achieve that objective.

II – **Legal context**

A – *Community Law*

3. Article 21 of the Sixth Directive, in the version resulting from Article 28g, (3) states, in extract:

‘The following shall be liable to pay value added tax:

I. under the internal system

...

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

B – *National legislation*

4. Article 37 of the Wet op de Omzetbelasting 1968 (Law on Turnover Tax) provides that anyone who makes any form of tax return in respect of turnover tax for which, save under Article 37, he is not liable shall become liable for that tax upon issuing the invoice, and must pay it in accordance with the tax return.

III – **Facts, questions referred and procedure**

5. Stadeco BV hires out stands for trade fairs, which it builds and takes down on location. In the years 1993 to 1995 it provided such services for the Economische Voorlichtingsdienst (Economic Affairs Press and Information Service; 'EVD'), an authority of the Netherlands Ministerie van Economische Zaken (the Ministry of the Economy,) at trade fairs and exhibitions in Germany and in non-member countries. It issued invoices for this to EVD referring to amounts described as VAT and paid the tax. EVD used the services supplied by Stadeco solely for activities in respect of which, as part of a body governed by public law, it is not entitled to deduct VAT.

6. The tax authorities informed Stadeco that it was not liable to pay VAT in the Netherlands in respect of those services, as they had not been supplied in the Netherlands. Stadeco therefore applied in 1996 for repayment of the tax, in the total sum of NLG 230 314 (EUR 104 512). The tax authorities requested Stadeco to draw up a credit note in favour of EVD in respect of the sums reclaimed and to send them a copy. By decision of 7 February 1997, the refund applied for was granted to Stadeco.

7. During an inspection in 2000, it was established that Stadeco had not issued any credit notes to EVD, nor had it made any repayment. For this reason, the tax authorities issued a supplementary tax notice, which Stadeco however successfully challenged before the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague).

8. By order of 30 November 2007, the Hoge Raad (Supreme Court of the Netherlands), before which the appeal against that decision had been brought, referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 21(1)(c) of the Sixth Directive to be interpreted as meaning that no liability to pay VAT arises in the Member State in which the issuer of the invoice is resident or established if the issuer of that invoice includes in it the VAT in respect of an activity which, according to the common system of value added tax, is deemed to be carried out in another Member State or in a non-member country?

(2) If not: if an invoice as referred to in Article 21(1)(c) of the Sixth Directive has been issued to a recipient of services who is not entitled to deduct VAT (and consequently there is no risk of any loss of tax revenues), are the Member States entitled to make the correction of the erroneously invoiced VAT which, according to that provision, is consequently liable to be paid, subject to the requirement that the taxable person subsequently issues a corrected invoice to his customer in which there is no mention of any VAT amount?'

9. In the proceedings before the Court, the Greek, German, Italian and Netherlands Governments and the Commission of the European Communities submitted written and oral observations. Stadeco only commented at the hearing before the Court.

IV – **Legal assessment**

A – *The first question*

10. By the first question, in substance, the referring court asks the Court whether Article 21(1)(c) of the Sixth Directive should be interpreted as meaning that the issuer of an invoice is liable for the VAT of a Member State mentioned in the invoice in that State even if the transaction was not actually taxable there.

11. A preliminary point to note is that this provision is applicable in cases such as the present where services were provided in another Member State.

12. Article 21(1) determines which persons are liable to pay tax *under the internal system.* So the provision covers not only transactions within the country, as the Dutch version (*binnenlands verkeer*) (4) would seem to suggest. The other language versions make it clear that the provision refers to transactions effected within the Community. (5) This also emerges from the systematic context. Transactions under the internal system in accordance with paragraph 1 and the special rules relating to them in paragraphs 2 and 3 contrast with imports into the Community governed by paragraph 4. The ambiguous reference to the internal system is moreover no longer mentioned in the new version in Article 203 of Directive 2006/112/EC. (6)

13. In addition, in *Reemtsma*, (7) a case with similar facts, the Court proceeded on the assumption that Article 21(1)(c) applied. That case also concerned the liability of the issuer of an invoice for the tax mentioned, but the tax was actually due from the recipient of the service in another Member State. In the end, that provision was nevertheless inapplicable, because it was not the issuer who requested the adjustment of tax, but the recipient.

14. However, Article 21(1)(c) establishes a tax liability only with respect to the State where VAT is mentioned in the invoice. In the absence of an explicit statement, it must be ascertained by interpretation of the invoice which VAT is involved. The tax rate, the currency of the amount invoiced, the issuer's and the recipient's place of establishment and the place where the service was provided, if that place is evident from the invoice, may be strong indications. That restrictive understanding is necessary in order to rule out the possibility that several Member States claim that the tax is due, on the basis of the same invoice.

15. According to the wording of Article 21(1)(c) of the Sixth Directive, a person is liable to pay tax merely because he mentions the tax on an invoice. (8)

16. It is uncertain whether that formal circumstance actually suffices to charge the tax, or whether there must also be a taxable transaction for the purposes of Articles 5 to 7 or Article 28a of the Sixth Directive in the State where VAT was mentioned on the invoice. In that latter case, the refund could be requested without a prior correction of the invoice, if the underlying transaction proves not to be taxable in the relevant State.

17. The meaning and purpose of Article 21(1)(c) militate against subjecting tax liability under that provision to the further requirement that the tax mentioned must also be in fact based on a taxable transaction in the relevant State.

18. The provision is intended to exclude the risk of any loss in tax revenues through the use of

the invoice in order to deduct VAT. (9) By mentioning the VAT in the invoice, the issuer gives the impression that a taxable transaction has been effected and that he has paid VAT or intends paying VAT. According to Article 21(1)(c) the issuer of the invoice must therefore also be liable for the payment of the tax. That is because, for the exercise of the right to deduct VAT, it suffices for the purposes of Article 18(1)(b) of the Sixth Directive that the taxable recipient holds an invoice mentioning the VAT, in accordance with the requirements of Article 22(3) of the Directive. Article 21(1)(c) ensures that VAT is not deducted without it having been actually paid.

19. In the *Genius Holding* (10) judgment, the Court in any case rejected the claim to deduct VAT in respect of tax mentioned on an invoice which does not correspond to the supply of goods or the provision of services. However, it is not always guaranteed that the tax authorities will gain knowledge of that fact. Moreover, the tax deduction may have already been granted before it becomes apparent that the invoiced supply of services or goods was not at all taxable or not taxable to the amount mentioned. Therefore the issuer of the invoice must be responsible for the payment of the tax mentioned, as long as the invoice has not been corrected and the risk of loss of tax revenue has not been eliminated. (11)

20. The tax liability referred to in Article 21(1)(c) is not ruled out simply because the recipient is not entitled to deduct VAT. As the German Government rightly stressed, it is not evident from the invoice alone whether the recipient is entitled to deduct VAT.

21. The answer to the first question is therefore that Article 21(1)(c) of the Sixth Directive is to be interpreted as meaning that the issuer of an invoice is liable for the VAT of a Member State mentioned in the invoice in that State, even if the transaction was not actually taxable there.

B – *The second question*

22. By the second question, the referring court asks whether the refund of the tax erroneously mentioned in an invoice can be made subject to the taxable person replacing the invoice with a corrected invoice.

23. In that regard, it should be noted that the Sixth Directive makes no provision for the correction of an invoice mentioning in error the VAT of a Member State, even though no taxable transaction was effected in that State. Consequently, it is for the Member States to ensure VAT neutrality by providing in their internal legal systems for the possibility of correcting any tax improperly invoiced. (12)

24. In the *Schmeink & Cofreth and Strobel* judgment, (13) the Court pointed out in that regard that measures which the Member States may adopt under Article 22(8) of the Sixth Directive in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives. They may not therefore be used in such a way that they would have the effect of undermining VAT neutrality, which is a fundamental principle of the common system of VAT. Where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss of tax revenues, it is not necessary to ensure the collection of VAT or to prevent tax evasion that the issuer demonstrates his good faith.(14)

25. That statement could be understood as meaning that the provisions of national law may not, in cases such as the present, where there is no risk of any loss of tax revenues, impose any further conditions for the refund of the tax. As ECD, the recipient of the invoice, is not entitled to deduct the erroneously mentioned Netherlands VAT, there is in the present case no risk of a loss of tax revenues for the Netherlands.

26. However, I do not think that the Court of Justice wished to set the Member States such

narrow limits. On the contrary, the national legislature enjoys a wide discretion with regard to the detailed formulation of the rules on the adjustment and refund of tax mentioned in error on an invoice. It must however observe the principles of equivalence and effectiveness (15) and the general principles of law, in particular the principle of proportionality. (16)

27. A national rule generally prescribing the exchange of an incorrect invoice against a correct invoice does not seem disproportionate. That condition is, as a rule, a suitable means of excluding any unwarranted deduction of VAT with the assistance of the original invoice. It serves the purpose of administrative simplification if the tax authorities are not required to examine in every individual case whether the recipient of the receipt is perhaps not entitled to deduct VAT, so that there is no threat of risk of any loss of tax revenues.

28. It must be borne in mind in this context that the taxable person, by issuing the incorrect invoice, has himself necessitated the replacement procedure and that the replacement of the invoice does not normally make the exercise of the right to refund excessively difficult. At most, it could be contrary to the principle of proportionality to refuse the refund where the invoice has not been replaced, if in the individual case a replacement is impossible, for example, because the invoice has been misplaced and the possibility of its being used to exercise the right to deduct VAT is ruled out.

29. That is not precluded by the Court's statement in *Collée* (17) 'that a national measure which, in essence, makes the right of exemption in respect of an intra-Community supply subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied, goes further than is necessary to ensure the correct levying and collection of the tax'. In contrast to the rules on the taxation of intra-Community acquisitions and the exemption of intra-Community supplies, the tax liability under Article 21(1)(c) does not depend on the material taxability of a transaction, but is tied solely to the formal criterion of being mentioned in an invoice.

30. Furthermore, it is settled case-law that Community law does not prevent a national legal system from disallowing repayment of charges which have been levied but were not due where to do so would lead to unjust enrichment of the recipients.(18) It follows that the refund may be tied to a condition which makes an unjust enrichment of the issuer of the invoice more difficult.

31. If there was a VAT amount originally mentioned in the invoice which was not actually payable or not payable to the amount specified, the recipient will – subject to specific contractual arrangements – have a civil claim for repayment of the amount wrongly paid. (19) By making the refund of the tax to the issuer of the invoice conditional on the issuer exchanging or in some suitable way correcting the invoice, the national rules ensure that the recipient receives the information necessary to exercise the right to repayment.

32. In the present case, there is no need to examine whether the Member States may, in addition, insist that the issuer of the invoice actually repay the unduly paid VAT to his contract partner. This seems to be required by the Netherlands tax authorities, according to the Netherlands Government, but the referring court has not asked about the admissibility of such a further condition. (20)

33. Last, it must also be observed that Community law contains no specific requirements for the adjustment of tax in the case that the transaction is not taxable in the State whose VAT is mentioned in the invoice but rather in another Member State or in a non-member country.

34. The Sixth Directive in particular does not oblige the first Member State to allow

reimbursement of the tax only on condition that the replacement invoice mentions the tax of the other Member State, as the Italian Government has argued. For that, the first Member State would have to assess whether the issuer of the invoice is liable for tax in the other Member State and in what amount. That assessment is however not automatically possible for the State whose VAT is to be reimbursed. In the other State, it could be the recipient and not the provider of the service who is liable for tax, for example, under Article 21(1)(b). Moreover, a non-harmonised exemption or a reduced rate could apply.

35. Irrespective of that, however, the issuer is obliged, under Article 22(3) of the Sixth Directive in conjunction with the relevant provisions of the implementing legislation of the Member State in which the transaction is actually subject to tax, to mention in the corrected invoice the tax he may be liable for in that State.

36. The answer to the second question is therefore that Community law does not prohibit Member States from making the correction of tax erroneously invoiced and hence payable under Article 21(1)(c) of the Sixth Directive subject to the requirement that the taxable person subsequently issues a corrected invoice to his customer. This applies even if the recipient of the invoice is not entitled to deduct VAT.

V – **Conclusion**

37. I accordingly propose that the questions referred for a preliminary ruling be answered as follows:

(1) Article 21(1)(c) of Sixth Directive 77/388/EEC, as amended by Directive 91/680/EEC, is to be interpreted as meaning that the issuer of an invoice is liable for the VAT of a Member State mentioned in the invoice in that State, even if the transaction was not actually taxable there.

(2) Community law does not prohibit Member States from making the correction of the tax erroneously invoiced and hence payable under Article 21(1)(c) of the Sixth Directive subject to the requirement that the taxable person subsequently issues a corrected invoice to his customer. This applies even if the recipient of the invoice is not entitled to deduct VAT.

1 – Original language: German.

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), replaced with effect from 1 January 2007 by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – In the version of Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1). By Council Directive 2000/65/EC of 17 October 2000 amending Directive 77/388 as regards the determination of the person liable for payment of value added tax (OJ 2000 L 269, p. 44), which is not temporally applicable to the facts of the main proceedings, subparagraph c became subparagraph d, without any changes to its content. The relevant provision is now to be found in Article 203 of Directive 2006/112.

4 – See, in that regard, the views set out in points 5.2 to 5.8 of the Opinion of Advocaat?General W. de Wit of 29 June 2007, which is part of the Hoge Raad’s order for reference.

5 – Compare, inter alia, FR: régime interne; IT: regime interno; EN: internal system; ES: régimen

interior.

6 – Cited in footnote 2.

7 – Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I?2425.

8 – See Case C?342/87 *Genius Holding* [1989] ECR 4227, paragraph 19; Case C-454/98 *Schmeink &Cofreth and Strobel* [2000] ECR I-6973, paragraph 53; Joined Cases C-78/02 to C-80/02 *Karageorgou and Others* [2003] ECR I-13295, paragraph 50; and *Reemtsma Cigarettenfabriken*, cited in footnote 7, paragraph 23.

9 – See the Commission proposal of 29 June 1973 for a Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, *Bulletin of the European Communities*, Supplement 11/73, p. 22.

10 – *Genius Holding*, cited in footnote 8, paragraph 15.

11 – For details see comments on the second question referred for a preliminary ruling.

12 – See, to that effect, *Genius Holding*, cited in footnote 8, paragraph 18; *Schmeink & Cofreth and Strobel*, cited in footnote 8, paragraphs 48, 49 and 56; and *Karageorgouand Others*, cited in footnote 8, paragraphs 49 and 50.

13 – Cited in footnote 8, paragraph 59, which refers to Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 52. See also Case C?146/05 *Collée* [2007] ECR I?7861, paragraph 26.

14 – *Schmeink & Cofreth and Strobel*, cited in footnote 8, paragraph 60, and *Karageorgou and Others*, cited in footnote 8, paragraph 50.

15 – See, inter alia, *Reemtsma Cigarettenfabriken*, cited in footnote 7, paragraph 37 and the case-law cited.

16 – See, on the applicability of the principle of proportionality to national measures for the purposes of implementing and supplementing the Sixth VAT Directive, inter alia, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paragraph 48, and Case C?25/07 *Sosnowska* [2008] ECR I-0000, paragraph 23.

17 – Cited in footnote 13, paragraph 29.

18 – Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 6; Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 47; and Case C?309/06 *Marks & Spencer* [2008] ECR I-0000, paragraph 41.

19 – In *Reemtsma Cigarettenfabriken*, cited in footnote 7, paragraph 39, the Court of Justice expressly held that it was permissible for the neutrality of VAT to be ensured by a civil law action for recovery of the sum received but not due.

20 – At the hearing, the representative of the Netherlands Government, in response to the Court's question, conceded that this condition was not expressly foreseen under national law at the time of the facts of the main proceedings.