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Judgment of the Court (Sixth Chamber) of 26 September 1996. - Etienne Debouche v Inspecteur der Invoerrechten en Accijnzen. - Reference for a preliminary ruling: Gerechtshof 's-Gravenhage - Netherlands. - Value added tax - Interpretation of Article 17(2) and (3)(a) of Directive 77/388/EEC and of Article 3(b) and the first paragraph of Article 5 of Directive 79/1072/EEC - Refund of value added tax to taxable persons not established in the territory of the country. - Case C-302/93.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Refund of the tax to taxable persons not established in the territory of the country ° Lawyer benefiting from an exemption in the Member State in which he is established ° Refund of the tax on services supplied to him in a Member State which does not exempt services supplied by lawyers ° Not permissible

(Council Directives 79/1072, Art. 3(b), and 77/388, Art. 28(3)(b) and Annex F)

Summary

Article 3(b) of the Eighth Directive on the harmonization of the laws of the Member States relating to turnover taxes ° Arrangements for the refund of value added tax to taxable persons not established in the territory of the country ° is to be interpreted as meaning that the fact that a lawyer benefits, pursuant to Article 28(3)(b) of the Sixth Directive and Annex F thereto, from an exemption in the Member State in which he is established does not entitle him to request the competent authorities of that Member State to issue the certificate mentioned therein and he is not, accordingly, entitled to a refund of the VAT charged on services supplied to him in a Member State in which he is not established and in which services supplied by lawyers are not exempted. It is clear from both Article 3(b) of the Eighth Directive and from the system established by the Sixth Directive that a taxable person who benefits from exemption and is consequently not entitled to deduct input tax paid in the territory of the country is not, in accordance with the objective pursued

by the VAT directives, entitled to a refund of VAT paid in another Member State either, or, consequently, to the issue of a certificate for the purposes of that provision.

Parties

In Case C-302/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof, The Hague, for a preliminary ruling in the proceedings pending before that court between

Étienne Debouche

and

Inspecteur der Invoerrechten en Accijnzen,

on the interpretation of Articles 17(2) and (3)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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) and of Article 3(b) and the first paragraph of Article 5 of the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonization of the laws of the Member States relating to turnover taxes ° Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11),

THE COURT (Sixth Chamber),

composed of: C.N. Kakouris, President of the Chamber, G. Hirsch (Rapporteur) and P.J.G. Kapteyn, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Mr Debouche, by S.T.M. Beelen and E.J. Janzen, tax advisers,

° the Netherlands Government, by J.G. Lammers, acting legal adviser in the Ministry of Foreign Affairs, acting as Agent,

° the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate-General of the European Communities of the Ministry of Foreign Affairs, and A. Correia, Deputy Director-General of the VAT administration service, acting as Agents,

° the Commission of the European Communities, by E. Traversa, of its Legal Service, acting as Agent, assisted by L. van den Berghe, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Debouche, represented by E.J. Janzen, the Netherlands Government, represented by J.S. van den Oosterkamp, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the German Government, represented by E. Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, and the Commission, represented by E. Traversa, assisted by L. van den Berghe, at the hearing on 23 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 1 February 1996,

gives the following

Judgment

Grounds

1 By order of 19 May 1993, received at the Court on 1 June 1993, the Gerechtshof, The Hague, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 17(2) and (3)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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, hereinafter "the Sixth Directive"), and of Article 3(b) and the first paragraph of Article 5 of the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonization of the laws of the Member States relating to turnover taxes ° Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11, hereinafter "the Eighth Directive").

2 That question was raised in proceedings between Mr Debouche and the tax authorities concerning entitlement to the refund of value added tax (hereinafter "VAT"), provided for in Articles 17 and 33 of the 1968 Wet op de Omzetbelasting (Law on Turnover Tax) which transposed the provisions of the Eighth Directive into Netherlands law.

3 The Kingdom of Belgium has availed itself of the possibility provided for by Article 28(3)(b) of the Sixth Directive, in conjunction with Annex F thereof, to exempt the services supplied by lawyers from VAT. By contrast, the same services are subject in the Netherlands to turnover tax.

4 Mr Debouche, a lawyer established in Belgium, hired a car from a leasing company established in the Netherlands which he used exclusively for his professional activity in Belgium.

5 He submitted an application to the Netherlands authorities for the refund of the VAT which he had been charged on the cost of hiring the vehicle for the period from 1 January to 31 October 1990.

6 Annexed to that application were the original invoices and a certificate, issued by the Belgian authorities, stating that Mr Debouche "is not subject to value added tax in Belgium because he is a supplier of services exempted pursuant to Article 28(3)(b) of the Sixth Directive and Annex F thereto ...".

7 Article 2 of the Eighth Directive lays down the following rule:

"Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the

transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC and of the provision of services referred to in Article 1(b)."

Article 3 of the Eighth Directive provides:

"To qualify for refund, any taxable person as referred to in Article 2 who supplies no goods or services deemed to be supplied in the territory of the country shall:

(...)

(b) produce evidence, in the form of a certificate issued by the official authority of the State in which he is established, that he is a taxable person for the purposes of value added tax in that State. However, where the competent authority referred to in the first paragraph of Article 9 already has such evidence in its possession, the taxable person shall not be bound to produce new evidence for a period of one year from the date of issue of the first certificate by the official authority of the State in which he is established. Member States shall not issue certificates to any taxable persons who benefit from tax exemption pursuant to Article 24(2) of Directive 77/388/EEC;

(...)"

The first paragraph of Article 5 provides that:

"For the purposes of this directive, goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of Directive 77/388/EEC as applicable in the Member State of refund."

8 When the competent tax inspector rejected his claim, Mr Debouche brought an action before the Gerechtshof, The Hague. The appellant in the main proceedings claims in particular that he is a taxable person within the meaning of Article 3(b) of the Eighth Directive and that, according to the first paragraph of Article 5 of that directive, entitlement to a refund is governed by the deduction rules of the Member State of refund, so that the Netherlands provisions, under which lawyers are entitled to deduct input VAT, are applicable to him.

9 The national court considered, in paragraph 6.2 of its order for reference, that the outcome of the dispute depended on the interpretation of Article 3(b) and the first paragraph of Article 5 of the Eighth Directive, on the one hand, in conjunction with Article 17(2) and (3)(a) of the Sixth Directive, on the other.

10 Accordingly, the national court stayed the proceedings and requested the Court to give a preliminary ruling on the following question:

"How must the provisions of the Sixth Directive in conjunction with the Eighth Directive ° mentioned specifically at paragraph 6.2 above ° be interpreted in order to assess the claim for the refund of turnover tax more particularly described above?"

11 In that question, the national court seeks in essence to ascertain whether Article 3(b) and the first paragraph of Article 5 of the Eighth Directive and Article 17(2) and (3)(a) of the Sixth Directive must be interpreted as meaning that a lawyer who, in the Member State in which he is established, is exempted from VAT pursuant to Article 28(3)(b) of the Sixth Directive in conjunction with Annex F thereto, is entitled to a refund of VAT imposed on services supplied to him within another Member State in which services supplied by lawyers are not exempted.

12 In order to give a reply which may help to resolve the dispute in the main proceedings, it should be borne in mind that in accordance with Article 3(b) of the Eighth Directive the taxpayer must, if he is to qualify for a refund, prove by means of a certificate issued by the authorities of the State in which he is established that he is a taxable person for the purposes of VAT in that State.

13 It is common ground that Mr Debouche has not submitted any such certificate to the Netherlands authorities.

14 It is particularly worth noting that a Member State is correct in not issuing a certificate for the purposes of Article 3(b) of the Eighth Directive to a lawyer who within that country supplies services exempted pursuant to Article 28(3)(b) of the Sixth Directive and Annex F thereto in the Member State in which he is established.

15 As provided by the last sentence of Article 3(b) of the Eighth Directive, a taxable person who benefits from exemption and is consequently not entitled to deduct input tax is not, in accordance with the objective pursued by the VAT directives, entitled to a refund of VAT paid in another Member State either.

16 That interpretation is in keeping with that given by the Court on Article 17 of the Sixth Directive. Except in the cases expressly provided for by the relevant directives, where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the latter person is not entitled to deduct the input VAT paid (see in particular Case C-4/94 BLP Group v Commissioners of Customs and Excise [1995] ECR I-983, paragraph 28).

17 It is apparent from Article 17(2) of the Sixth Directive that a lawyer benefitting from the exemption under Article 28(3)(b) and Annex F thereto is not entitled to deduct input tax.

18 Moreover, it is not the purpose of the Eighth Directive to undermine the scheme introduced by the Sixth Directive. According to the third recital in the preamble, the Eighth Directive is intended rather to eliminate discrepancies between the arrangements then in force in the Member States, which gave rise in some cases to deflection of trade and distortion of competition. In accordance with the fifth recital, the Eighth Directive must not "lead to the treatment of taxable persons differing according to the Member State in the territory of which they are established".

19 Mr Debouche nevertheless relies on that fifth recital in the preamble to the directive in order to obtain a refund. However, if that were so, he would be treated more favourably than Netherlands lawyers who are entitled to deduct input tax because they effect taxed transactions whereas Mr Debouche carries out exempted transactions.

20 The answer to the question referred must therefore be that Article 3(b) of the Eighth Directive is to be interpreted as meaning that the fact that a lawyer benefits, pursuant to Article 28(3)(b) of the Sixth Directive and Annex F thereto, from an exemption in the Member State in which he is established does not entitle him to request the competent authorities of that Member State to issue the certificate mentioned therein and he is not, accordingly, entitled to a refund of the VAT charged on services supplied to him in a Member State in which he is not established and in which services supplied by lawyers are not exempted.

Decision on costs

Costs

21 The costs incurred by the Netherlands, German and Portuguese Governments and the Commission of the European Communities, which have submitted observations to the Court, are

not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Gerechtshof, The Hague, by order of 19 May 1993, hereby rules:

Article 3(b) of the Eighth Council Directive (No 79/1072/EEC of 6 December 1979 on the harmonization of the laws of the Member States relating to turnover taxes ° Arrangements for the refund of value added tax to taxable persons not established in the territory of the country) is to be interpreted as meaning that the fact that a lawyer benefits, pursuant to Article 28(3)(b) of the Sixth Council Directive (No 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ° Common system of value added tax: uniform basis of assessment) and Annex F thereto, from an exemption in the Member State in which he is established does not entitle him to request the competent authorities of that Member State to issue the certificate mentioned therein and he is not, accordingly, entitled to a refund of the VAT charged on services supplied to him in a Member State in which he is not established and in which services supplied by lawyers are not exempted.