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Judgment of the Court (Fifth Chamber) of 5 December 1996. - John Reisdorf v Finanzamt Köln-West. - Reference for a preliminary ruling: Bundesfinanzhof - Germany. - Value added tax - Interpretation of Article 18(1)(a) of the Sixth Council Directive 77/388/EEC - Deduction of input tax paid - Obligation of the taxable person - Possession of an invoice. - Case C-85/95.

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Keywords

1 Preliminary rulings - Jurisdiction of the Court - Limits - Contrived dispute or request for interpretation of provisions of Community law manifestly inapplicable in the main proceedings

(EC Treaty, Art. 177)

2 Tax provisions - Harmonization of laws - Turnover tax - Common system of value added tax - Deduction of input tax paid - Obligations of the taxable person - Possession of an invoice - Invoice - Definition - Possibility for the Member States to allow as an invoice documents other than the original invoice

(Council Directive 77/388, Arts 18(1)(a) and 22(3))

Summary

3 Provided that the questions submitted to it for a preliminary ruling concern the interpretation of a provision of Community law, the Court gives its ruling without, in principle, having to look into the circumstances in which a national court was prompted to submit the questions and envisages applying the provision of Community law which it has asked the Court to interpret.

The matter would be different only if it were apparent either that the procedure provided for in Article 177 of the Treaty had been diverted from its true purpose and was being used in fact to lead the Court to give a ruling by means of a contrived dispute, or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying.

4 In the context of the right of a person subject to value added tax to deduct from the tax which he is liable to pay the amount of input tax paid, Article 18(1)(a) and Article 22(3) of the Sixth Directive (77/388) on the harmonization of the laws of the Member States relating to turnover taxes permit the Member States, who are given the power to determine the rules relating to supervision of the exercise of the right to deduct input tax and in particular the manner in which taxable persons are to establish that right, to regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves, and confer on them the power to require production of the original invoice in order to establish the right to deduct input tax, as well as the power, where a taxable person no longer holds the original, to admit other evidence that the transaction in respect of which the deduction is claimed actually took place.

Parties

In Case C-85/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

John Reisdorf

and

Finanzamt Koeln-West

on the interpretation of Article 18(1)(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),

THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida (Rapporteur), President of the Chamber, C. Gulmann, D.A.O. Edward, J.-P. Puissochet and P. Jann, Judges,

Advocate General: N. Fennelly,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Reisdorf, by Hans-Peter Taplick, tax adviser,

- the German Government, by Ernst Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same Ministry, acting as Agents,

- the Greek Government, by Vassileios Kontolaimos, Deputy Legal Adviser in the State Legal Service, and Dimitra Tsagkarakis, Adviser to the State Secretary for Foreign Affairs, acting as

Agents,

- the French Government, by Catherine de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same Directorate, acting as Agents,

- the United Kingdom Government, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, assisted by Sarah Lee, Barrister,

- the Commission of the European Communities, by Juergen Grunwald, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Reisdorf, represented by Rainer Olschewski, Rechtsanwalt, Cologne; the German Government, represented by Ernst Roeder; the Greek Government, represented by Vassileios Kontolaimos; the French Government, represented by Frédéric Pascal, Central Administrative Attaché in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by Juergen Grunwald, at the hearing on 20 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1996,

gives the following

Judgment

Grounds

1 By order of 12 October 1994, received at the Court on 20 March 1995, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 18(1)(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, 'the Sixth Directive').

2 Those questions were raised in proceedings between Mr Reisdorf and the Finanzamt (Tax Office) Koeln-West ('the Finanzamt') concerning whether Mr Reisdorf can be absolved from the requirement to produce the original invoices in respect of value added tax ('VAT') which he seeks to deduct.

3 Article 17(1) and (2)(a) of the Sixth Directive, which governs the right to deduct input tax, states:

'(1) The right to deduct shall arise at the time when the deductible tax becomes chargeable.

(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.'

4 Article 18(1)(a) and (3) adds:

`(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);

...

(3) Member States shall determine the conditions and procedures whereby a taxable person may be authorized to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2.'

5 Finally, Article 22(2), (3) and (8) states:

`(2) Every taxable person shall keep accounts in sufficient detail to permit application of the value added tax and inspection by the tax authority.

(3) (a) Every taxable person shall issue an invoice, or other document serving as invoice in respect of all goods and services supplied by him to another taxable person, and shall keep a copy thereof.

Every taxable person shall likewise issue an invoice in respect of payments on account made to him by another taxable person before the supply of goods or services is effected or completed.

(b) The invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions.

(c) The Member States shall determine the criteria for considering whether a document serves as an invoice.

...

(8) Without prejudice to the provisions to be adopted pursuant to Article 17(4), Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.'

6 According to the file on the main proceedings, in 1988 Mr Reisdorf constructed, in a building owned by him, commercial premises, which he let from November 1988 to a supermarket operator. Having waived exemption from VAT under Paragraph 4(12)(a) of the Umsatzsteuergesetz (Law on Turnover Tax, `UStG'), he sought deduction of sums corresponding to the input tax on the construction of the premises.

7 During a special VAT inspection carried out by the Finanzamt, Mr Reisdorf was asked to produce the original invoices relating to the amounts claimed as deductions.

8 Under Paragraph 15(1)(1) of the UStG, a trader may, subject to certain other requirements which are not relevant to this case, deduct as input tax the tax which is shown separately on invoices, within the meaning of Paragraph 14 of the UStG, in respect of supplies and other services provided for his undertaking by other traders. Paragraph 14(4) provides that an `invoice' means any document by which a trader or a third party on his behalf charges the recipient of goods or services for a supply or other service, irrespective of how that document is described in business dealings.

9 Mr Reisdorf presented copies of various invoices, in particular intermediate invoices from the head contractor, but not the originals. As a result, the Finanzamt reduced the amount of input tax.

10 After an unsuccessful objection against that reduction, Mr Reisdorf brought an action before the Finanzgericht (Finance Court), which was dismissed. The court held that he had failed to prove, despite having been called upon to do so, that the conditions establishing the right to deduct input tax due or paid laid down by Paragraph 15(1)(1) of the UStG were satisfied, since he had not produced the original invoices, which still existed and which he himself indicated he could obtain.

11 Basing its decision on Paragraphs 14 and 15 of the UStG, the Finanzgericht took the view that only the original invoice drawn up and given or sent to the recipient of goods or services for the purposes of settlement with the supplier could be regarded as capable of proving the right to deduct input tax. The original invoice could be distinguished by its uniqueness, inasmuch as it was identifiable and could not be confused with multiple, duplicate or copy invoices. The original invoice had to be produced unless it had been lost or could not be obtained within a certain period, in which case the necessary evidence could be adduced in some other way, using all the means of evidence permitted under national law, including copies of invoices and analogous documents. The plaintiff in the case before it had not pleaded that the original invoices had been lost. He therefore had to bear the adverse consequences in law, since it was for him to prove that he had the right to deduct input tax.

12 Mr Reisdorf applied to the Bundesfinanzhof for review of that judgment on the ground that Paragraphs 14 and 15 of the UStG had been infringed.

13 In the order for reference, the Bundesfinanzhof found that national law did not determine how the right to deduct input tax was to be proved and that Article 18(1)(a) of the Sixth Directive provided that, in order to be able to deduct the tax which he was liable to pay, a taxable person had to 'hold an invoice, drawn up in accordance with Article 22(3)'. Being uncertain as to what should be regarded as an 'invoice' within the meaning of Article 18(1)(a), the Bundesfinanzhof ruled that the proceedings should be stayed and the following questions referred to the Court of Justice for a preliminary ruling:

(1) Is an "invoice" within the meaning of Article 18(1)(a) of the Sixth Directive 77/388/EEC only the original, that is to say, the original copy of the statement of account, or are carbon copies, duplicates or photocopies also to be regarded as invoices in that sense?

(2) Does the term "hold" within the meaning of Article 18(1)(a) of the Sixth Directive 77/388/EEC signify that the taxable person must at all times be in a position to present the invoice to the tax authorities?

(3) Is the exercise of the right to deduct input tax precluded by virtue of Article 18(1)(a) of the Sixth Directive 77/388/EEC where the taxable person no longer "holds" an invoice?

Admissibility

14 Mr Reisdorf considers that this case turns on the definition of an 'invoice' conferring entitlement to a deduction. Article 22(3)(c) of the Sixth Directive allows the Member States to determine the criteria for regarding a document as an invoice. Therefore, if the Bundesfinanzhof took the view that the Federal Republic of Germany had failed to comply, or comply in full, with its obligation to legislate under Article 22(3)(c), it should remedy the omission itself without referring the matter to the Court.

15 That objection must be dismissed. It is clear from the actual wording of the order for reference that the national court is seeking an interpretation by the Court of Article 18(1)(a) of the Sixth

Directive. Provided that the questions submitted concern the interpretation of a provision of Community law, the Court gives its ruling without, in principle, having to look into the circumstances in which a national court was prompted to submit the questions and envisages applying the provision of Community law which it has asked the Court to interpret (see to that effect Case C-67/91 Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others [1992] ECR I-4785, paragraphs 25 and 26, and Case C-62/93 BP Supergas v Greek State [1995] ECR I-1883, paragraph 10).

16 The matter would be different only if it were apparent either that the procedure provided for in Article 177 had been diverted from its true purpose and was being used in fact to lead the Court to give a ruling by means of a contrived dispute, or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying (see to that effect Case C-67/91, paragraph 26, and Case C-62/93, paragraph 10, both cited above). That is not so in this case.

17 An answer must therefore be given to the questions referred.

Substance

18 The three questions, which should be considered together, seek essentially to ascertain whether Article 18(1)(a) of the Sixth Directive permits the Member States to regard as an 'invoice' not only the original, that is to say the original copy of the statement of account, but also other documents such as carbon copies, duplicates or photocopies, and whether a taxable person who no longer holds the original invoice may be allowed to prove the right to deduct input tax by other means.

19 In order to answer those questions, it is necessary to distinguish the provisions of the directive relating to exercise of the right to deduct input tax from those concerning proof of that right after a taxable person has exercised it. The distinction between exercise of the right and proof of it on subsequent inspections is inherent in the operation of the VAT system.

20 As regards, first, exercising the right to deduct input tax, Article 18(1)(a) of the Sixth Directive requires the taxable person to 'hold an invoice, drawn up in accordance with Article 22(3)'. The term 'invoice' must therefore be interpreted by reference to Article 18(1)(a) in conjunction with Article 22(3).

21 Article 22(3) contains mandatory rules for the drawing up of invoices and subparagraph (a) imposes an obligation on every taxable person, in respect of all goods and services supplied by him to another taxable person, to 'issue an invoice or other document serving as invoice'. In addition, Article 22(3)(c) allows the Member States to lay down the criteria determining whether a document 'serves as an invoice'.

22 It is apparent from Article 18(1)(a), read in conjunction with Article 22(3), that exercise of the right to deduct input tax is normally dependent on possession of the original of the invoice or of the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice. As pointed out by the Advocate General in paragraph 17 of his Opinion, the different language versions of those provisions which were authentic at the time of adoption of the Sixth Directive confirm that interpretation, even though the wording of Article 22(3)(c) in the German text does not indicate as clearly that the task of the Member States is to lay down the criteria determining whether another document may serve as an invoice.

23 The power conferred on the Member States by Article 22(3)(c) to lay down the criteria determining whether documents other than the original invoice may serve as an invoice includes the power to decide that a document cannot serve as an invoice if an original has been drawn up and is in the possession of the recipient.

24 That power of the Member States is consistent with one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected, under the supervision of the tax authorities (see the seventeenth recital in the preamble and Article 22(2) and (8)). In that regard, the Court held in Joined Cases 123/87 and 330/87 *Jeunehomme and EGI v Belgian State* [1988] ECR 4517, at paragraphs 16 and 17, that the Member States may require invoices to contain additional information to ensure the correct levying of VAT and permit supervision by the authorities, in so far as such particulars do not, by reason of their number or technical nature, render the exercise of the right to deduct input tax practically impossible or excessively difficult.

25 It must therefore be concluded that Article 18(1)(a) and Article 22(3) of the Sixth Directive permit the Member States to regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves.

26 As regards, secondly, the provisions of the Sixth Directive relating to proof of the right to deduct input tax after it has been exercised by a taxable person, it should be noted that, as the German Government has rightly pointed out, Article 18, in accordance with its heading, deals only with exercise of the right of deduction and does not govern proof of that right after it has been exercised by a taxable person.

27 The obligations owed by taxable persons after they have exercised the right to deduct input tax derive from other provisions of the Sixth Directive. Article 22(2) thus requires every taxable person to keep accounts in sufficient detail to permit application of VAT and inspection by the tax authorities. Article 22(8) adds that Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

28 Admittedly, Article 22 contains no provision specifically governing proof by the taxable person of the right to deduct input tax.

29 However, it follows from the provisions mentioned above, conferring on the Member States the power to require additional information as regards invoices and to impose any other obligation necessary for the correct levying and collection of the tax and for the prevention of fraud, that the Sixth Directive gives Member States the power to determine the rules relating to supervision of the exercise of the right to deduct input tax, in particular the manner in which taxable persons are to establish that right. As indicated by the Advocate General in paragraphs 26 and 27 of his Opinion, that power includes the power to require production of the original invoice when tax inspections are carried out and also, where a taxable person no longer holds it, to allow him to produce other cogent evidence that the transaction in respect of which the deduction is claimed actually took place.

30 Accordingly, in the absence of specific rules governing proof of the right to deduct input tax, Member States have the power to require production of the original invoice in order to establish that right, as well as the power, where a taxable person no longer holds the original, to admit other evidence that the transaction in respect of which the deduction is claimed actually took place.

31 The answer to the national court's questions must therefore be that Article 18(1)(a) and Article 22(3) of the Sixth Directive permit the Member States to regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves, and confer on them the power to require production of the original

invoice in order to establish the right to deduct input tax, as well as the power, where a taxable person no longer holds the original, to admit other evidence that the transaction in respect of which the deduction is claimed actually took place.

Decision on costs

Costs

32 The costs incurred by the German, Greek, French and United Kingdom 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 action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof, by order of 12 October 1994, hereby rules:

Article 18(1)(a) and Article 22(3) 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 permit the Member States to regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves, and confer on them the power to require production of the original invoice in order to establish the right to deduct input tax, as well as the power, where a taxable person no longer holds the original, to admit other evidence that the transaction in respect of which the deduction is claimed actually took place.