Case C-377/08

EGN BV – Filiale Italiana

v

Agenzia delle Entrate – Ufficio di Roma 2

(Reference for a preliminary ruling from the Corte suprema di cassazione)

(Sixth VAT Directive – Article 17(3)(a) – Deductibility and refunding of input VAT – Provision of telecommunications services – Supply of services for a customer established in another Member State – Article 9(2)(e) – Determination of the place where the service is provided)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Goods and services used for the purposes of transactions of the taxable person carried out abroad

(Council Directive 77/388, Art. 17(3)(a))

Article 17(3)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as meaning that a supplier of telecommunications services, which is established in the territory of a Member State, is entitled under that provision to deduct or obtain a refund in that Member State of input value added tax on telecommunications services that have been supplied to an undertaking having its principal place of business in another Member State, since such a supplier would have had that right if the services at issue had been supplied in the territory of the former Member State.

(see para. 34, operative part)

JUDGMENT OF THE COURT (Seventh Chamber)

2 July 2009 (*)

(Sixth VAT Directive – Article 17(3)(a) – Deductibility and refunding of input VAT – Provision of telecommunications services – Supply of services for a customer established in another Member State – Article 9(2)(e) – Determination of the place where the service is provided)

In Case C?377/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Corte suprema di cassazione (Italy), made by decision of 23 April 2008, received at the Court on 18 August 2008, in the

proceedings

EGN BV – Filiale Italiana

v

Agenzia delle Entrate – Ufficio di Roma 2,

THE COURT (Seventh Chamber),

composed of A.Ó Caoimh (Rapporteur), President of Chamber, J.N. Cunha Rodrigues and J. Klu?ka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– EGN BV – Filiale Italiana, by G. Boniello and G. Polacco, avvocati,

– the Commission of the European Communities, by A. Aresu and M. Afonso, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 17(3)(a) of 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18), (‘the Sixth Directive’).

2 This reference was made in the course of proceedings between EGN BV – Filiale Italiana (‘EGN’) and Agenzia delle Entrate – Ufficio di Roma 2 (Revenue Authority – Rome Office 2), (the ‘Agenzia’), concerning the latter’s refusal to authorise deduction of the value added tax (VAT) on telecommunications services EGN had supplied during 1999.

Legal context

Community legislation

3 The seventh recital in the preamble to the Sixth Directive reads:

‘Whereas the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards supplies of goods for assembly and the supply of services; whereas although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods’.

4 Article 2(1) of the Sixth Directive provides that ‘[t]he following shall be subject to [VAT]: … the supply of … services effected for consideration within the territory of the country by a taxable person acting as such’.

5 Article 4(1) and (2) of the Sixth Directive provide:

‘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.’

6 Article 9(1) and (2)(e) of the Sixth Directive provide:

‘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:

– transfers and assignments of copyrights, patents, licences, trade marks and similar rights,

– advertising services,

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

– obligations to refrain from pursuing or exercising, in whole or in part, a business activity or a right referred to in this point (e),

– banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes,

– the supply of staff,

– the services of agents who act in the name and for the account of another, when they procure for their principal the services referred to in this point (e),

– the hiring out of movable tangible property, with the exception of all forms of transport.'

7 Article 17 of the Sixth Directive reads as follows:

'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) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…

3. Member States shall also grant to every taxable person the right to a deduction or refund of the [VAT] referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

a) transactions relating to the economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country;

…'

8 Council Decision 97/207/EC of 17 March 1997 authorising the Italian Republic to apply a measure derogating from Article 9 of the Sixth Directive 77/388 (OJ 1997 L 86, p. 19), adopted in response to a request from that Member State, provides:

'Article 1

By way of derogation from Article 9(1) of [the Sixth Directive], the Italian Republic is authorised to include, within Article 9(2)(e) of the directive, telecommunications services. …

Telecommunications services shall be deemed to be services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the transfer or assignment of the right to use capacity for such transmission, emission or reception.

Article 2

This Decision may be applied to telecommunications services in respect of which the chargeable event took place from 1 January 1997. …

Article 3

The authorisation specified in this decision shall apply until 31 December 1999, or, if a directive altering the place of taxation of telecommunications services enters into force at an earlier date, until that date.

Article 4

This Decision is addressed to the Italian Republic.'

9 After the adoption of Decision 97/207, Council Directive 1999/59/EC of 17 June 1999 amending Directive 77/388 (OJ 1997 L 162, p. 63) added, with effect from 1 January 2000, a ninth indent to Article 9(2)(e) of the Sixth Directive, worded as follows:

'Telecommunications. Telecommunications services shall be deemed to be services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception. Telecommunications services within the meaning of this provision shall also include provision of access to global information networks.'

National legislation

10 The Sixth Directive was transposed into Italian law by Presidential Decree No 633 of 26 October 1972 establishing and laying down rules on value added tax (ordinary supplement to GURI No 292 of 11 November 1972), as subsequently amended, ('Decree No 633/1972').

11 Article 7(4)(d) of Decree No 633/1972, which concerns the territoriality of the tax, provides *inter alia* that '… telecommunications services … shall be deemed to be effected in Italy where they are supplied to persons having a permanent address in Italy or who reside there and do not have a permanent address abroad or are supplied to permanent establishments in Italy of persons who have a permanent address or reside abroad, unless they are used outside the [Community]'. Article 7(4)(e) provides furthermore that 'the services referred to at (d) which are supplied to persons who have a permanent address or reside in other Member States of the [Community] shall be deemed to be effected in Italy where the person to whom the services are supplied is not liable to VAT in the State in which he has a permanent address or resides'.

12 Article 19(1) of Decree No 633/1972 provides for the deductibility of VAT on 'goods and services imported or obtained in the course of carrying on a business or being engaged in a trade or profession'. Under Article 19(2), VAT is not deductible in respect of purchases or imports relating to 'transactions that are exempt or, in any event, not subject to VAT'. However, according to Article 19(3)(b), 'the non-deductibility referred to in paragraph 2 shall not apply if the abovementioned transactions constitute … transactions effected outside Italy which, if they were effected within Italy, would give rise to the right to deduct'.

13 Article 30(2)(d) of Decree No 633/1972 provides that, in the event that the annual VAT return shows a deductible surplus, a taxable person may choose to deduct the next year the amount of the surplus from the preceding year or request a refund of all or part of the deductible surplus 'where the majority of his transactions are not subject to VAT in pursuance of Article 7'.

The dispute in the main proceedings and the question referred for a preliminary ruling

14 EGN is the Italian subsidiary of EGN – Equant Global Network BV, a company constituted under Netherlands law, controlled by the *Société Internationale de Télécommunictions Aéronautiques*, a cooperative society constituted under Belgian law which was founded in 1949 by 11 airline companies for the purpose of establishing a dedicated telecommunications system for air transport.

15 During 1999, EGN supplied telecommunications services to Ensys Ltd, a company which is

established in Ireland, where it is subject to VAT, and which is also controlled by the *Société Internationale de Télécommunictions Aéronautiques*.

16 As those services were not subject to VAT in Italy since the condition of being established in that Member State laid down in Article 7(4)(d) of Decree No 633/1972 was not met, EGN, which was perennially a VAT creditor as regards tax inputs in respect of its suppliers who were also established in Italy, applied to the Agenzia, on 7 February 2000, for a refund of ITL 9 400 000 000 in respect of VAT for 1999, and a refund of the outstanding credit of ITL 101 968 000 for preceding years.

17 That application for a refund was refused, by decision of the Agenzia of 23 March 2001, on the ground that the conditions for deduction or refund of the input VAT paid by EGN were not met.

18 Ruling on the appeal lodged by EGN against that refusal, the Commissione tributaria provinciale di Roma (Provincial Tax Court, Rome) held, by a decision of 10 September 2001, that under Article 7 of Decree No 633/1972 the appellant was entitled to deduct VAT in the case of transactions not subject to that tax which, were they effected in Italy, would otherwise have been taxable under Article 19(3)(b) of that decree.

19 After the Agenzia had appealed against that decision, the Commissione tributaria regionale del Lazio (Regional Tax Office, Lazio) set the decision aside by a judgment of 19 September 2003 and refused EGN's applications for the deduction and refund of input VAT. That court held that Article 19(3)(b) of Decree No 633/1972 was not applicable on the ground that 'transactions effected outside Italy which, if they were effected within Italy, would give rise to the right to deduct' refers solely to transactions that have actually been effected abroad. The legal fiction of extraterritoriality provided for in Article 7(4)(e) of that decree cannot be taken into account since there is no rule which places fictitious extraterritoriality based on a legal provision on the same footing as actual extraterritoriality. Thus, as the telecommunications services at issue were not subject to VAT in Italy, Article 19(2) of that decree precluded them from giving rise to the right to deduction or refund of input VAT.

20 In the appeal in cassation brought by EGN, the referring court, finding that the relevant provisions of the Sixth Directive had been the subject of differing interpretations by the lower national courts, could not be sure that the interpretation adopted by the Commissione tributaria regionale del Lazio would not lead to distortion of competition. Since in the case of telecommunications services being supplied to another Member State the place where the VAT is payable is the place where the person to whom the service is to be supplied is established, a provider of such services finds himself in a less favourable situation as compared with a provider supplying the same services within one and the same Member State.

21 In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is it permissible under Article 17(3)(a) of [the Sixth Directive], in cases involving the supply of telecommunications services between taxable persons resident in different Member States of the Community and where the recipient is liable to value added tax, for the supplier to deduct the tax payable on the acquisition or importation of goods connected with [the supply of telecommunications services] which that supplier would be entitled to deduct if he provided the same services within his own country?'

The question referred for a preliminary ruling

22 By its question, the referring court is asking in essence whether Article 17(3)(a) of the Sixth

Directive must be interpreted as meaning that a supplier of telecommunications services such as the one at issue in the main proceedings, which is established in the territory of a Member State, is entitled under that provision to deduct or obtain a refund in that Member State of input VAT on telecommunications services that have been supplied to an undertaking established in another Member State.

23 It should be observed that, under Article 17(3)(a) of the Sixth Directive, every person subject to VAT within the meaning of Article 4(1) of that directive has the right to deduct or obtain a refund of VAT in so far as the goods and services for which that input VAT has been paid are used in connection with economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if those activities had taken place in the territory of the Member State.

24 In this case, it is common ground that EGN is subject to VAT in Italy, since it pursues in that Member State economic activities involving the supply of telecommunications services, which fall within the provisions of Article 4(1) and (2) of the Sixth Directive.

25 It is also apparent from the order for reference that, where such services are supplied to customers established in Italy, they constitute services effected within that Member State which give rise in that State to the right to deduction or refund of input VAT under Article 17(2)(a) of the Sixth Directive in conjunction with Article 2(1) of that directive.

26 In those circumstances, in order to determine whether telecommunications services supplied by an undertaking such as EGN, which is established in Italy, to an undertaking whose principal place of business is located in another Member State, in this case Ireland, give rise in the first Member State to the right to deduction or refund of input VAT, it is necessary to examine whether such services can be regarded as having been ‘carried out in another country’ for the purposes of Article 17(3)(a) of the Sixth Directive.

27 It should be noted in that regard that Article 9 of the Sixth Directive contains rules for determining the place where services are deemed to be supplied for VAT purposes. Whereas Article 9(1) lays down a general rule in that regard, 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 (see, in particular, Case C?327/94 *Dudda* [1996] ECR I?4595, paragraph 20; Case C?291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet* [2009] ECR I?0000, paragraph 24; and Case C?1/08 *Athesia Druck* [2009] ECR I?0000, paragraph 20).

28 It should also be noted that, in respect of the relationship between Article 9(1) and (2) of the Sixth Directive, 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). If not, it falls within the scope of Article 9(1) (see in particular, Case C?167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I?1195, paragraph 11; Case C?452/03 *RAL (Channel Islands) and Others* [2005] ECR I?3947, paragraph 24; and Case C?114/05 *Gillan Beach* [2006] ECR I?2427, paragraph 15).

29 As is apparent from the seventh recital in the preamble to the Sixth Directive, the overall purpose of Article 9(2) of that directive is to establish a special system for services provided between taxable persons where the cost of the services is included in the price of the goods (*Dudda*, paragraphs 22 and 23, and *Gillan Beach*, paragraphs 16 and 17).

30 In this case, the supply of telecommunications services such as those at issue in the main proceedings falls within the specific place of supply criteria contained in Article 9(2)(e) of the Sixth

Directive.

31 It should, however, be noted that, as regards the period at issue in the main proceedings, application of those specific place of supply criteria in relation to such telecommunications services stems not from the actual provisions of Article 9(2)(e) of the Sixth Directive, as suggested both by the referring court and by EGN, but, as the Commission of the European Communities rightly pointed out, from the first paragraph of Article 1 of Decision 97/207, which, following a request made to that effect by the Italian Republic, authorised that Member State, by way of derogation from Article 9(1) of that directive, to include telecommunications services within Article 9(2)(e) of the directive from 1 January 1997 until 31 December 1999, or until the date of the entry into force of a directive amending the latter provision. The addition of telecommunications services to Article 9(2)(e) of the Sixth Directive results from the subsequent adoption of Directive 1999/59, which was not to be implemented by Member States until 1 January 2000.

32 It is clear from the actual wording of Article 9(2)(e) of the Sixth Directive in conjunction with the first paragraph of Article 1 of Decision 97/207 that the place where telecommunications services are performed for taxable persons established in the Community but not in the same country as the supplier is 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.

33 Consequently, since in the case in the main proceedings the customer for the telecommunications services at issue is a taxable person established in a different Member State from that in which the supplier of those services has its principal place of business, those services must be regarded as having been ‘carried out in another country’ within the meaning of Article 17(3)(a) of the Sixth Directive and so they must give rise to the right to deduction or refund of input VAT since such services would give rise to such a right if they had been performed in the territory of the same Member State.

34 In view of the foregoing, the answer to the question referred should be that Article 17(3)(a) of the Sixth Directive must be interpreted as meaning that a supplier of telecommunications services such as the one at issue in the main proceedings, which is established in the territory of a Member State, is entitled under that provision to deduct or obtain a refund in that Member State of input VAT on telecommunications services that have been supplied to an undertaking having its principal place of business in another Member State, since such a supplier would have had that right if the services at issue had been supplied in the territory of the former Member State.

Costs

35 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 17(3)(a) of 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, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as meaning that a supplier of telecommunications services such as the one at issue in the main proceedings, which is established in the territory of a Member State, is entitled under that provision to deduct or obtain a refund in that Member State of input value added tax on telecommunications services that have been supplied to an undertaking having its principal place of business in another Member State, since such a supplier would have had that right if the services at issue had been supplied in the territory of the former Member State.

[Signatures]

* Language of the case: Italian.