JUDGMENT OF THE COURT (Tenth Chamber)

6 February 2014 (*)

(Directive 79/1072/EEC – Common system of value added tax – Taxable persons residing in another Member State – Rules for refund of VAT – Taxable persons designating a tax representative in accordance with provisions of national law preceding accession to the European Union – Precluded – Meaning of ‘taxable person not established in the territory of the country’ – Condition of not being established – Condition of no supply of goods or services – Supplies of electricity to taxable dealers – Directive 2006/112/EC – Article 171)

In Case C?323/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucure?ti (Romania), made by decision of 26 April 2011, received at the Court on 5 July 2012, in the proceedings

E. ON Global Commodities SE, formerly E.ON Energy Trading SE,

v

Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Solu?ionare a Contesta?iilor,

Direc?ia General? a Finan?elor Publice a Municipiului Bucure?ti – Serviciul de administrare a contribuabililor nereziden?i,

THE COURT (Tenth Chamber),

composed of A. Rosas, acting President of the Tenth Chamber, D. Šváby and C. Vajda (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 16 May 2013,

after considering the observations submitted on behalf of:

– E. ON Global Commodities SE, formerly E.ON Energy Trading SE, by A. Duncea and A. Ioni?oaei, avoca?i,

– the Romanian Government, by R. H. Radu, A.-L. Cri?an, R.?M. Giurescu and E. Gane, acting as Agents,

– the European Commission, by L. Keppenne, L. Lozano Palacios and G.?D. Balan, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of provisions of the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation 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 Eighth Directive').

2 The request was made in proceedings between E.ON Global Commodities SE, formerly E.ON Energy Trading SE ('E.ON'), a company established in Germany, and the Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Solu?ionare a Contesta?iilor (a national tax authority agency) and the Direc?ia General? a Finan?elor Publice a Municipiului Bucure?ti – Serviciul de administrare a contribuabililor nereziden?i (the Public Finance Directorate General in Bucharest – Department for non?residents liable to tax) (together referred to hereafter as 'the tax authorities'), concerning a refund of input value added tax ('VAT') paid by E.ON in connection with its business in Romania.

Legal context

European Union law

Directive 2006/112/EC

3 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2007/75/EC of 20 December 2007 (OJ 2007 L 346, p. 13; 'the VAT Directive') entered into force on 1 January 2007.

– Provisions concerning electricity

4 Under Article 15(1) of the VAT Directive, electricity is to be treated as tangible property for the purposes of VAT.

5 Article 38 of the VAT Directive provides:

'1. In the case of the supply of gas through the natural gas distribution system, or of electricity, to a taxable dealer, the place of supply shall be deemed to be the place where that taxable dealer has established his business or has a fixed establishment for which the goods are 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. For the purposes of paragraph 1, "taxable dealer" shall mean a taxable person whose principal activity in respect of purchases of gas or electricity is reselling those products and whose own consumption of those products is negligible.'

6 Article 39 of that directive states:

'In the case of the supply of gas through the natural gas distribution system, or of electricity, where such a supply is not covered by Article 38, the place of supply shall be deemed to be the place where the customer effectively uses and consumes the goods.

Where all or part of the gas or electricity is not effectively consumed by the customer, those non-

consumed goods shall be deemed to have been used and consumed at the place where the customer has established his business or has a fixed establishment for which the goods are supplied. In the absence of such a place of business or fixed establishment, the customer shall be deemed to have used and consumed the goods at the place where he has his permanent address or usually resides.'

– Provisions concerning the chargeability of VAT

7 Pursuant to Article 63 of the VAT Directive, the chargeable event is to occur and VAT is to become chargeable when the goods or the services are supplied.

8 Article 193 of the VAT Directive provides that VAT is to be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202 of that directive.

9 Article 195 of the VAT Directive provides:

'VAT shall be payable by any person who is identified for VAT purposes in the Member State in which the tax is due and to whom goods are supplied in the circumstances specified in Articles 38 or 39, if the supplies are carried out by a taxable person not established within that Member State.'

– Provisions concerning deduction of VAT and refund of input VAT

10 Article 168(a) of the VAT Directive provides that, in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person is to be entitled, in the Member State in which he carries out those transactions, to deduct, from the VAT which he is liable to pay, the VAT due or paid in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.

11 Article 169)(a) of the VAT Directive adds that, in addition to the deduction referred to in Article 168, the taxable person is to be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of transactions relating to economic activities carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if those transactions were carried out within that Member State.

12 Article 170 of the VAT Directive is worded as follows:

'All taxable persons who, within the meaning of Article 1 of [the Eighth Directive] and Article 171 of this Directive, are not established in the Member State in which they purchase goods and services or import goods subject to VAT shall be entitled to obtain a refund of that VAT in so far as the goods and services are used for the purposes of the following:

(a) transactions referred to in Article 169;

(b) transactions for which the tax is solely payable by the customer in accordance with Articles 194 to 197 or Article 199.'

13 Article 171(1) of the VAT Directive is worded as follows:

'VAT shall be refunded to taxable persons who are not established in the Member State in which they purchase goods and services or import goods subject to VAT but who are established in another Member State, in accordance with the detailed implementing rules laid down in [the Eighth Directive].

The taxable persons referred to in Article 1 of [the Eighth Directive] shall also, for the purposes of applying that Directive, be regarded as taxable persons who are not established in the Member State concerned where, in the Member State in which they purchase goods and services or import goods subject to VAT, they have only carried out the supply of goods or services to a person designated in accordance with Articles 194 to 197 or Article 199 as liable for payment of VAT.'

The Eighth Directive

14 The Eighth Directive was repealed as from 1 January 2010 by Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112, to taxable persons not established in the Member State of refund but established in another Member State (OJ 2008 L 44, p. 23). Having regard to the time of the transactions at issue in the main proceedings, only the Eighth Directive, which was in force until 31 December 2009, is applicable to those proceedings.

15 Article 1 of the Eighth Directive provides:

'For the purposes of this Directive, "a taxable person not established in the territory of the country" shall mean a person … who … has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected, nor, if no such seat or fixed establishment exists, his domicile or normal place of residence, and who … has supplied no goods or services deemed to have been supplied in that country, [with the exception of certain transport services and certain other services].'

16 Under Article 2 of the Eighth Directive, each Member State is to 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 by the Eighth Directive, 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, in so far as such goods and services are used for the purposes of the transactions referred to in [Article 169(a) of the VAT Directive].

17 Articles 3 and 4 of the Eighth Directive set out a number of conditions which must be satisfied by a taxable person who seeks to qualify for the refund of VAT paid.

18 According to Article 6 of the Eighth Directive, Member States may not, in addition to the obligations laid down by Articles 3 and 4 of that directive, impose on taxable persons referred to in Article 2 of that directive any obligation other than that of providing, in specific cases, the information necessary to determine whether an application for refund is justified.

Romanian law

19 Law No 571/2003 on the Tax Code (*Monitorul Oficial al României*, Part I, No 927 of 23 December 2003, 'the Tax Code') is designed to transpose the VAT Directive and the Eighth Directive into Romanian law.

20 Article 132(1)(e) of the Tax Code provides, in wording substantially identically to that of Article 38 of the VAT Directive, that the place of supply of electricity to a taxable dealer is deemed to be the place where that taxable dealer has established his business.

21 Article 150(1)(d) of the Tax Code is designed to transpose Article 195 of the VAT Directive into Romanian law and provides in essence that, where there is a supply of electricity to a taxable dealer identified for VAT purposes in Romania by a taxable person non-resident in Romania, even if the latter is identified for VAT purposes in Romania, the taxable dealer is liable to pay VAT.

22 Article 147c of the Tax Code, headed 'Refund of tax to taxable persons not identified for VAT purposes in Romania', provides in paragraph (1)(a) that a 'taxable person who is not identified and who is under no obligation to be identified for VAT purposes in Romania and is established in another Member State' may apply for a refund of the tax paid under the conditions established by regulations.

23 Article 49(3) of the Romanian Government Decree No 44 of 22 January 2004, approving the detailed rules for the implementation of the Tax Code *(Monitorul Oficial al României*, Part I, No 112, of 6 February 2004), in the version applicable at the material time, determines the detailed rules for the implementation of the Tax Code as follows:

'the taxable person referred to in Article 147c(1)(a) of the Tax Code shall be the taxable person who, during the period indicated in paragraph 1, was not identified and was under no obligation to be identified for VAT purposes in Romania ..., who is not established in Romania and also does not have a fixed establishment there from economic activities are carried out, and who, during the same period, did not supply any goods or services in Romania, with the exception of:

...

(b) supplies of goods and/or services, where the tax relating thereto is paid by the persons to whom the goods or services are supplied, in accordance with Article 150(1) … (d) ... of the Tax Code.'

24 Under Article 151(3) of the Tax Code, in force until 31 December 2006, persons established in a State other than Romania who carried out taxable supplies of goods in Romania were obliged to designate a tax representative in Romania. That provision was repealed upon the accession of Romania to the European Union.

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

25 E.ON has been active in the energy sector of the Romanian market since October 2005.

26 In order to meet the obligations imposed by the Tax Code, in the version in force prior to the accession of Romania to the European Union, on taxable persons established in a State other than Romania, on 1 January 2007 E.ON designated SC Haarmann Hemmelrath & Partner Management Consulting SRL, now RSM Hemmelrath Consulting SRL ('Haarmann'), as its tax representative in Romania. Haarmann is a legal person under Romanian law with its seat in Bucharest and is identified for VAT purposes in Romania.

27 As the tax representative of E.ON, Haarmann entered into contracts with Romanian legal persons. Between 15 October 2005 and 31 December 2006, Haarmann carried out business in the name of E.ON, as its tax representative, which consisted of supplying electricity and re?invoicing transport services, in respect of which it issued tax invoices.

28 The obligation to designate a tax representative having been abolished when Romania became a member of the European Union, Haarmann stopped issuing tax invoices on behalf of E.ON after 1 January 2007. Haarmann however continued to represent E.ON in Romania, in particular vis-à-vis the tax authorities.

29 Between 1 January and 31 August 2007, E.ON sought to deduct the VAT amounting to 5 118 071 Romanian lei (RON) which it had paid on the basis of invoices issued by its trading partners, who were Romanian legal persons, as suppliers of services. That amount was broken down as follows:

– RON 2 466 611 of VAT relating to services relating to conversion of coal for energy purposes supplied by a Romanian thermoelectric station;

– RON 2 612 888 of VAT relating to services relating to transport of coal by rail supplied by a Romanian transport company;

– RON 97 of VAT relating to customs services, and

– RON 38 475 of VAT relating to electricity transmission services supplied by an electricity network management company.

30 Haarmann, as representative of E.ON, submitted to the tax authorities four VAT returns in April, July, August and September 2007, covering, respectively, the months of March, June, July and August 2007, in order to obtain the deduction of VAT corresponding to that sum.

31 Following the submission of those returns, Haarmann was the subject of a partial tax inspection for the period from 19 October 2005 to 31 August 2007.

32 The tax authorities refused, in their inspection report issued on 21 May 2008, to accept the deduction amounting to RON 5 118 071 concerning transactions carried out after 1 January 2007. They considered, in essence, that, pursuant to Article 150(1)(d) of the Tax Code, in force since 1 January 2007, E.ON ceased to be a taxable person for VAT purposes in Romania in respect of energy supplies, which meant that it ceased to invoice and collect VAT in respect of those supplies in Romania, that obligation falling, as from 1 January 2007, on the recipient of those supplies. Consequently, since E.ON did not carry out in Romania any activity as a taxable person subject to VAT, its tax representative did not have the right to deduct the VAT relating to acquisitions effected in order to supply electricity after 1 January 2007. Further, retaining its tax representative in Romania and carrying out transactions through its intermediary ceased to be a lawful option after 1 January 2007.

33 On the basis of the tax inspection report, the tax authorities issued an additional VAT assessment notice in May 2008.

The first legal proceedings

34 E.ON challenged that tax assessment notice. Following the rejection of its complaint to the tax authorities, E.ON brought before the Curtea de Apel Bucure?ti an action which was upheld. The tax assessment notice was annulled for the sum of RON 5 118 071 and the tax authorities were ordered to repay that sum to E.ON.

35 The tax authorities having brought an appeal, the Înalta Curte de Casa?ie ?i Justi?ie varied the judgment of the Curtea de Apel Bucure?ti and definitively dismissed, by judgment of 8 February 2011, E.ON’s action in its entirety. When the request for a preliminary ruling was drawn

up, the reasons for that judgment had not yet been stated.

The second legal proceedings

36 Since the tax authorities did not accept of E.ON's right to deduct, on 30 June 2008 it brought an application for refund of the sum of RON 5 118 071 in respect of VAT on the basis of the Eighth Directive and Article 147c(1)(a) of the Tax Code, intended to transpose that directive into Romanian law, and relating to the 2007 calendar year.

37 By decision of 29 January 2009, the tax authorities rejected that refund application on the view that, in the period in question, covering the months from January to August 2007, E.ON did not satisfy the requirements stemming from Article 147c(1)(a) of the Tax Code, given that the refund under that provision concerns taxable persons who are not identified for VAT purposes and who are under no obligation to be identified for that purpose in Romania, whereas E.ON continued to be represented for tax purposes in Romania by Haarmann and, consequently, E.ON was in fact identified for VAT purposes in Romania.

38 The administrative action for review of that decision was rejected, the tax authorities considering that, inter alia, application of provisions of the Eighth Directive was devoid of purpose in relation to non-residents who were identified for VAT purposes and who were entitled to deduct VAT relating to transactions carried out.

39 E.ON brought an action against the decision of 29 January 2009 before the Curtea de Apel Bucure?ti, claiming, in essence that, contrary to what was maintained by the tax authorities, the Eighth Directive does not provide that a taxable person's entitlement to a refund of VAT paid is subject to the condition that that taxable person must not be either identified for VAT purposes or under an obligation to be identified for that purpose in Romania. The tax authorities did not submit their view on the proceedings to the referring court.

40 In those circumstances, the Curtea de Apel Bucure?ti decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) May a taxable person having its principal place of business in a Member State of the European Union … other than Romania, and that has identified for VAT purposes a tax representative in Romania, on the basis of the provisions of domestic law in force before Romania acceded to the European Union, be regarded as a "taxable person not established in the territory of the country", within the meaning of Article 1 of [the Eighth Directive]?

(2) Does the requirement, laid down in Article 147c(1)(a) [of] the Tax Code which transposes the provisions of the [Eighth] Directive, that the legal person should not be identified for VAT purposes, represent a further condition in addition to those expressly provided for in Articles 3 and 4 of the Eighth Directive and, if so, is a further condition of this kind permitted, having regard to Article 6 of the [Eighth] Directive?

(3) Can Articles 3 and 4 [of the Eighth Directive] have direct effect, in other words, does satisfaction of the conditions expressly laid down by those provisions confer on a legal person not established in the territory of Romania, within the meaning of Article 1, the right to a refund of VAT, regardless of the form they are given in the national legislation?'

Consideration of the questions referred for a preliminary ruling

41 By its three questions, which can be examined together, the referring court seeks to ascertain, in essence, whether the provisions of the Eighth Directive must be interpreted as

meaning that the fact that a taxable person established in a Member State who has carried out supplies of electricity in another Member State designates a tax representative identified for VAT purposes in that second State means that that taxable person cannot rely on the Eighth Directive in the latter State in order to obtain a refund of input VAT.

42 In that regard, it must be observed that Article 1 of the Eighth Directive provides, in essence, two cumulative conditions which must be satisfied before a taxable person can be regarded as not being established in the territory of the country, and therefore entitled to a refund under Article 2 of that directive. First, the taxable person in question must not possess any establishment in the Member State where he is seeking to claim that refund. Secondly, he must not have made any supplies of goods or services in respect of which the place of supply is deemed to be in that Member State, with the exception of certain supplies of specified services.

43 It must be added that, according to Article 6 of the Eighth Directive, Member States may not, in addition to the obligations laid down in Articles 3 and 4 of that directive, impose on taxable persons referred to in Article 2 of that directive any obligation other than that of providing, in specific cases, the information necessary to determine whether the application for refund is justified.

44 It is necessary to examine the two conditions referred to paragraph 42 of this judgment.

The condition relating to there being no establishment in the Member State concerned

45 As submitted by all the parties who have presented observations to the Court, it is clear that the fact that a taxable person established in a Member State has a tax representative who is identified for VAT purposes in another Member State cannot be the equivalent of acquiring an establishment in that Member State within the meaning of Article 1 of the Eighth Directive.

46 It is apparent from settled case-law that, in order to be considered an establishment to which the supplies of goods and services by a taxable person are connected, an establishment must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to carry out the transactions under consideration on an independent basis (see, to that effect, Case C?190/95 *ARO Lease* [1997] ECR I?4383, paragraph 16, and Case C?390/96 *Lease Plan Luxembourg* [1998] ECR I?2553, paragraph 24).

47 Yet the mere designation of a tax representative does not suffice to permit the taxable person concerned to be regarded as having available a structure possessing a sufficient degree of permanence and his own staff who are responsible for the management of his economic activities.

48 It follows that national legislation which treats the existence of a tax representative as the equivalent of having an establishment in the territory of the country within the meaning of Article 1 of the Eighth Directive is contrary to that provision.

The condition that there are no supplies of goods and services in the Member State concerned

49 It follows from the wording of Article 1 of the Eighth Directive, as stated in paragraph 42 of this judgment, that the right to a refund for taxable persons under that directive is also subject to the condition that, in the period concerned, the applicant for a refund of VAT has not made any supplies of goods and services in respect of which the place of supply is deemed to be in the Member State concerned.

50 In order to assess whether a situation such as that in the main proceedings satisfies such a requirement, it must first be observed that, under Article 38(1) of the VAT Directive, in the case of

supplies of electricity to a ‘taxable dealer’ within the meaning of Article 38(2), the place of supply is to be deemed to be the place where that taxable dealer has established his business.

51 Next, electricity is, under Article 15(1) of the VAT Directive, to be treated as tangible property for VAT purposes, and consequently none of the exceptions concerning certain supplies of services, laid down in Article 1 of the Eighth Directive, can apply.

52 Last, under the second subparagraph of Article 171(1) of the VAT Directive, the taxable persons referred to in Article 1 of the Eighth Directive are also, for the purposes of applying that directive, to be regarded as not established in the Member State concerned where they have only carried out in that Member State supplies of goods to a person designated in accordance with Article 195 of the VAT Directive as liable for payment of VAT. Article 195 particularly applies to supplies of electricity to taxable dealers identified for VAT purposes in the Member State where the tax is payable and to whom the goods are supplied in the circumstances specified in Article 38 of the VAT Directive.

53 Contrary to the argument put forward by the Romanian Government, the identification of a company such as E.ON for VAT purposes in Romania through the intermediary of a tax representative cannot validly be treated by the national legal order as demonstrating that such a company has in fact carried out supplies of goods or services in that Member State within the meaning of Article 1 of the Eighth Directive. It is patent from the wording of that article and from Article 171 of the VAT Directive that, if the right to a refund under the Eighth Directive is to be excluded, there must be a finding not only that there is a mere capacity to carry out taxable transactions in the State where the refund application is submitted, but that such transactions have actually been carried out.

54 In the light of the foregoing, it is for the referring court to determine whether, in the situation at issue in the main proceedings, E.ON can in fact be regarded as not having made supplies of goods or services in respect of which the place of supply is deemed to be Romania, within the meaning of Article 1 of the Eighth Directive.

55 Further, as regards the argument of the Romanian Government, at the hearing, that E.ON, by maintaining its tax representative, created a legal vacuum, thereby depriving it of any possibility of obtaining a refund of VAT, it must be stated that, if the effect of the supplies of electricity concerned is to render the Eighth Directive inapplicable, the deduction of input VAT must, as a rule, be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The principle of fiscal neutrality precludes a penalty consisting in a refusal of the right to a refund or the right to deduct (see Case C?284/11 *EMS-Bulgaria Transport* [2012] ECR, paragraphs 71 and 77; see also, by analogy, Case C?146/05 *Collée* [2007] ECR I?7861, paragraph 31).

56 As regards, last, the enquiry raised by the referring court in its third question, it must be stated that, according to settled case?law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the State has failed to transpose the directive into national law within the time-limit or has transposed it incorrectly (see Case C?549/11 *Orfey Balgaria* [2012] ECR, paragraph 51 and case?law cited). It is clear that the provisions examined above, in particular Articles 1, 3 and 4 of the Eighth Directive and Articles 171 and 195 of the VAT Directive, satisfy those conditions.

57 In the light of all the foregoing, the answer to the questions referred is that the provisions of the Eighth Directive, read together with Articles 38, 171 and 195 of the VAT Directive, must be interpreted as meaning that a taxable person established in one Member State and who has made

supplies of electricity to taxable dealers established in another Member State has the right to rely on the Eighth Directive in the latter State in order to obtain a refund of input VAT. That right is not precluded merely by the designation of a tax representative who is identified for VAT purposes in the latter State.

Costs

58 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 (Tenth Chamber) hereby rules:

The provisions 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, read together with Articles 38, 171 and 195 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2007/75/EC of 20 December 2007, must be interpreted as meaning that a taxable person established in one Member State and who has made supplies of electricity to taxable dealers established in another Member State has the right to rely on the Eighth Directive 79/1072 in the latter State in order to obtain a refund of input value added tax. That right is not precluded merely by the designation of a tax representative who is identified for value added tax purposes in the latter State.

[Signatures]

* Language of the case: Romanian.