

JUDGMENT OF THE COURT (Second Chamber)

2 October 2014 (\*)

(Reference for a preliminary ruling — Sixth VAT Directive — Article 8(1)(a) — Determination of the place of supply of goods — Supplier established in a Member State other than the Member State in which the person to whom the goods are supplied is established — Processing of the goods in the Member State where the person to whom the goods are supplied is established)

In Case C-446/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 25 July 2013, received at the Court on 7 August 2013, in the proceedings

**Fonderie 2A**

v

**Ministre de l'Économie et des Finances,**

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.L. da Cruz Vilaça, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2014,

after considering the observations submitted on behalf of:

- Fonderie 2A, by D. Le Prado, avocat,
- the French Government, by D. Colas and J.-S. Pilczer, acting as Agents,
- the Greek Government, by I. Bakopoulos and M. Skorila, acting as Agents,
- the European Commission, by L. Lozano Palacios and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2014,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of the provisions 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 The request has been made in proceedings between Fonderie 2A, a company whose registered office is in Italy, and the *Ministre de l'Économie et des Finances* (French Minister for Economic Affairs and Finance) concerning the refusal to refund to that company the value added tax ('VAT') which it paid in France in 2001 for work which was carried out in France.

## Legal context

### *EU law*

#### The Sixth Directive

3 The Sixth Directive was repealed and replaced, with effect from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, given that the VAT at issue in the main proceedings was paid in 2001, the relevant provisions are those of the Sixth Directive.

4 Article 2 of the Sixth Directive is worded as follows:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

...'

5 Article 5(1) of the Sixth Directive defines the term 'supply of goods' as follows:

"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

6 Article 8 of the Sixth Directive, pursuant to which the place of taxable transactions is determined, provides in paragraph 1(a) that, in the case of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person, the place of supply of the goods is to be deemed to be the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins.

7 Article 28a of the Sixth Directive, which determines the scope of the transitional arrangements for the taxation of trade between Member States, provides:

'1. The following shall also be subject to [VAT]:

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such ...

...

3. "Intra-Community acquisition of goods" shall mean acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods

by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported.

...

5. The following shall be treated as supplies of goods effected for consideration:

(b) the transfer by a taxable person of goods from his undertaking to another Member State.

The following shall be regarded as having been transferred to another Member State: any tangible property dispatched or transported by or on behalf of the taxable person out of the territory defined in Article 3 but within the Community for the purposes of his undertaking, other than for the purposes of one of the following transactions:

...

– the supply of a service performed for the taxable person and involving work on the goods in question physically carried out in the Member State in which the dispatch or transport of the goods ends, provided that the goods, after being worked upon, are re-dispatched to that taxable person in the Member State from which they had initially been dispatched or transported.

...

6. The intra-Community acquisition of goods for consideration shall include the use by a taxable person for the purposes of his undertaking of goods dispatched or transported by or on behalf of that taxable person from another Member State within the territory of which the goods were produced, extracted, processed, purchased, acquired as defined in paragraph 1 or imported by the taxable person within the framework of his undertaking into that other Member State.

...'

8 Article 28f of the Sixth Directive, headed 'Right of deduction', states:

'1. Article 17(2), (3) and (4) shall be replaced by the following:

"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 every taxable person the right to the 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 referred to in Article 4(2), carried out in another country, which would be deductible if they had been performed within the territory of the country;

...

4. The refund of [VAT] referred to in paragraph 3 shall be effected:

– to taxable persons who are not established within the territory of the country but who are established in another Member State in accordance with the detailed implementing rules laid down in [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’)],

– ...”

...’

## The Eighth Directive

9 Article 1 of the Eighth Directive states:

‘For the purposes of this Directive, “a taxable person not established in the territory of the country” shall mean a person as referred to in Article 4(1) of [the Sixth Directive] who, during the period referred to in the first and second sentences of the first subparagraph of Article 7(1), 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, during the same period, has supplied no goods or services deemed to have been supplied in that country ...’

10 Article 2 of the Eighth Directive provides:

‘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 [VAT] 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 [the Sixth Directive] and of the provision of services referred to in Article 1(b).’

### *French law*

11 Article 256 of the code général des impôts (General Tax Code), in the version applicable to the facts of the main proceedings (‘the CGI’), provides:

I. The supply of goods or services effected for consideration by a taxable person acting as such shall be subject to [VAT].

II. 1 The transfer of the right to dispose of movable tangible property as owner shall be regarded as a supply of goods.

...’

12 Article 258 of the CGI is worded as follows:

I. The place of supply of movable tangible property shall be deemed to be in France where the property is in France:

- (a) at the time of dispatch or transport by the vendor, by the person to whom it is supplied, or on their behalf, to the person to whom it is supplied;
- (b) when it is assembled or installed by or on behalf of the vendor;
- (c) when it is made available to the person acquiring it, without dispatch or transport;
- ...

13 Article 271 of the CGI and Article 242-0 M of Annex II to the CGI implement Articles 1 and 2 of the Eighth Directive.

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

14 In 2001 the applicant in the main proceedings manufactured metal parts in Italy which it sold to Atral, a company whose registered office is in France.

15 Before those parts were supplied to Atral, the applicant in the main proceedings dispatched them, on its own behalf, to another French company, Saunier-Plumaz, in order for it to carry out finishing work on them, that is to say, painting work, and then forward them directly to the final purchaser.

16 The sale price for the parts on Fonderie 2A's invoice to Atral included the finishing work. The service provider, that is to say, Saunier-Plumaz, invoiced Fonderie 2A in respect of the finishing work, for an amount which also included VAT on that work.

17 Fonderie 2A applied to the French tax authorities, on the basis of the national provisions implementing the Eighth Directive, for a refund of the VAT which it had thereby been charged.

18 That application was refused on the ground that, under the national provisions implementing the Sixth Directive, the place of supply of the goods was in France.

19 Fonderie 2A brought an action challenging that refusal before the tribunal administratif de Paris (Administrative Court, Paris), which dismissed the action by a judgment dated 3 July 2008. After the appeal lodged by it was also dismissed, by the cour administrative d'appel de Paris (Administrative Court of Appeal, Paris) in a judgment of 21 October 2010, the applicant in the main proceedings appealed on a point of law to the Conseil d'État (Council of State).

20 In the appeal on a point of law, the applicant in the main proceedings contends that the provisions of the CGI adopted to transpose the Sixth Directive into French law were misconstrued by the cour administrative d'appel de Paris. It submits that it made an intra-Community supply from Italy and did not carry out any taxable transaction in France, so that the person to whom the goods were supplied is liable for the VAT on that intra-Community acquisition.

21 In those circumstances, the Conseil d'État decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the provisions of the Sixth Directive for defining the place of an intra-Community supply of goods mean that the supply of goods by a company to a customer in another country of the European Union, after the goods have, on the vendor's behalf, undergone processing at the place of business of another company in the country of the customer is a supply between the country of the vendor and the country of the final recipient or a supply within the territory of the country of the final recipient, from the place of business of the processor?'

## **Consideration of the question referred**

### *Preliminary observations*

22 It is apparent upon reading Article 1 of the Eighth Directive in conjunction with Article 2 thereof that a supplier of goods, in the situation of the applicant in the main proceedings, is entitled to a refund of the VAT charged in respect of those goods that he has paid to a service provider established in another Member State only if he has supplied no goods or services deemed to have been supplied in that Member State. If a supplier of goods, in the situation of the applicant in the main proceedings, has made a supply of goods in that Member State, the principle of neutrality of VAT does not require the VAT paid to the service provider to be refunded since that supplier, in so far as the services provided by the former have been used for the purposes of the supplier's taxable transactions, is entitled to deduct VAT, in accordance with Article 17(2)(a) of the Sixth Directive in the version resulting from Article 28f(1) thereof.

23 The national court thus seeks to determine whether the supply of goods that is made by a supplier, in the situation of the applicant in the main proceedings, to a person established in another Member State is deemed to have been carried out in that Member State when the supplier entrusts finishing work to a service provider established in that Member State before having the goods transported to the person to whom they are being supplied.

24 Even though the question asked refers in general terms to the provisions of the Sixth Directive enabling the place of an intra-Community supply of goods to be defined, it must be considered to relate to the interpretation of Article 8(1)(a) of the directive. It is clear from the case-law that that provision, which enables the place of an intra-Community supply of goods to be determined, makes no distinction between 'intra-Community' supplies and 'internal' supplies (see judgment in *EMAG Handel Eder*, C-245/04, EU:C:2006:232, paragraph 46).

25 Consequently, as the Advocate General observes in point 52 of her Opinion, the place of the supply of goods consisting in the sale by Fonderie 2A to Atral of the metal parts at issue in the main proceedings must be determined in the light of Article 8(1)(a) of the Sixth Directive and the existence of a 'transfer' or 'use' within the meaning of Article 28a(5)(b) and (6) of the directive is irrelevant in this regard, so that it is unnecessary to interpret the latter provisions in order to answer the question referred.

26 Accordingly, by its question, the national court asks, in essence, whether Article 8(1)(a) of the Sixth Directive must be interpreted as meaning that the place of supply of goods sold by a company established in a Member State to a person established in another Member State, and on which the vendor has had finishing work carried out by a service provider established in that other Member State before having them dispatched by the service provider to the person to whom they are being supplied, must be deemed to be in the Member State where the supplier of the goods is established or, on the contrary, in the Member State where the person supplied is established.

### *Answer of the Court*

27 Regard should be had, first, to the wording of Article 8(1)(a) of the Sixth Directive, pursuant to which the place of supply of goods is to be deemed to be 'the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins'. On a literal interpretation of this provision, the view cannot be taken that the place of a supply such as that between the applicant in the main proceedings and the person to whom the goods were supplied is in the Member State where the supplier is established. The goods in question were dispatched first of all to the service provider which was established in another Member State and the latter then dispatched them, after carrying out finishing work, to the person receiving the supply, established in that other Member State. The only goods that were the subject of the contract between the supplier of the goods and the person to whom they were supplied, that is to say, the finished goods, were accordingly, 'at the time when dispatch or transport to the person to whom they [were] supplied [began]', within the meaning of Article 8(1)(a) of the Sixth Directive, already in the Member State where the latter is established.

28 Second, this literal interpretation is borne out by the broad logic of that provision. The place of a 'supply of goods' within the meaning of Article 5(1) of the Sixth Directive, that is to say, the place where the right to dispose of tangible property as owner is transferred, must be determined in accordance with the rules laid down in Article 8(1) of the Sixth Directive. When a supplier of goods, in the situation of the applicant in the main proceedings, dispatches the goods to a service provider instructed to carry out finishing work, he does not transfer the right to dispose of the goods in question as owner to the person to whom the goods are being supplied. Such a dispatch is concerned solely with rendering the goods in question compliant with the supplier's contractual obligations so that a supply to that person may subsequently take place.

29 In this connection, it is also to be noted that Article 8(1)(a) of the Sixth Directive requires the existence of a sufficient temporal and material link between the supply of the goods in question and the dispatch of those goods, as well as continuity in the course of the transaction (see judgment in *X*, C-784/09, EU:C:2010:693, paragraph 33).

30 Such a link and such continuity are lacking if the dispatch of the goods by the supplier to the service provider is for the purpose of processing them before they are supplied to the person acquiring them, in order to render them compliant with the contractual obligations between the supplier and that person. In those circumstances, the place of the supply, within the meaning of Article 8(1)(a) of the Sixth Directive, is deemed to be the place where the goods that have become compliant with the contractual obligations between those two parties are.

31 Finally, such an interpretation is consistent with the objective of the provisions of the Sixth Directive relating to determination of the place of taxable transactions, which seek to avoid both double taxation and non-taxation of those transactions (see to this effect, concerning Article 9 of the Sixth Directive, judgment in *ADV Allround*, C-218/10, EU:C:2012:35, paragraph 27 and the case-law cited). As the Advocate General observes in point 42 of her Opinion, that interpretation enables the place of supply of goods to be determined unequivocally, and this place establishes which Member State is entitled to the VAT relating to that transaction.

32 Accordingly, the answer to the question referred is that Article 8(1)(a) of the Sixth Directive must be interpreted as meaning that the place of supply of goods sold by a company established in a Member State to a person established in another Member State, and on which the vendor, to make them fit to be supplied, has had finishing work carried out by a service provider established in that other Member State, before having them dispatched by the service provider to the person to whom they are being supplied, must be deemed to be in the Member State where the latter is established.

## Costs

33 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 (Second Chamber) hereby rules:

**Article 8(1)(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 the place of supply of goods sold by a company established in a Member State to a person established in another Member State, and on which the vendor, to make them fit to be supplied, has had finishing work carried out by a service provider established in that other Member State, before having them dispatched by the service provider to the person to whom they are being supplied, must be deemed to be in the Member State where the latter is established.**

[Signatures]

\* Language of the case: French.