Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 July 2014[1]

Case C-446/13

Société Fonderie 2A
v
Ministre de l'Économie et des Finances

(Request for a preliminary ruling from the Conseil d'État (French Republic))

(Tax law — Value added tax — First sentence of Article 8(1)(a) of Sixth Directive 77/388/EEC — Place of supply of goods dispatched or transported — Point in time at which the dispatch of goods to the person acquiring them begins in the case where they undergo interim processing in the Member State of the person acquiring them — Article 28a(5), (6) and (7) of Sixth Directive 77/388/EEC — Chargeable events of intra-Community transfer and use of goods — Article 28c(A)(a) of Sixth Directive 77/388/EEC — Tax exemption for intra-Community supplies of goods)

I – **Introduction**

1. This case provides a further illustration of the complexity of the system for charging value added tax on cross-border trade within the European Union. As some of the rules of the European Union's VAT legislation are difficult to understand, even straightforward cases are not easy to resolve.

2. In this instance, a company sold metal parts from Italy to France. Since the metal parts were painted in France while on their way to the person acquiring them, the question of where the sale is to be taxed — in Italy or in France — is not easy to answer, unfortunately.

3. The present case gives the Court an opportunity, however, to complete its case-law on the beginning, end and duration of 'intra-Community transport' and the supply to which it is to be ascribed.[2]

II – **Legal context**

4. In the period material to the main proceedings, value added tax was charged on the basis 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[3] in the version applicable to the year 2001 ('the Sixth Directive').

1 — Original language: German.

2 — See judgments in *EMAG Handel Eder* (C-245/04, EU:C:2006:232); *X* (C-84/09, EU:C:2010:693); *Euro Tyre Holding* (C-430/09, EU:C:2010:786); and *VSTR* (C-587/10, EU:C:2012:592).

3 — OJ 1977 L 145, p. 1.

Chargeable events

5. In accordance with Article 2(1) of the Sixth Directive, 'the supply of goods … effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to value added tax. Article 5(1) of the Sixth Directive defines the supply of goods as 'the transfer of the right to dispose of tangible property as owner'.

6. The 'transitional arrangements for the taxation of trade between Member States' (Title XVIa of the Sixth Directive) created an additional chargeable event provided for in Article 28a(1)(a) of the Sixth Directive:

'(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 ...'

7. The transitional arrangements also equate certain transactions with the two chargeable events provided for in Article 2(1) and Article 28a(1)(a) of the Sixth Directive.

8. Thus, Article 28a(5) of the Sixth Directive provides:

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

(a) [repealed]

(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 the goods in question by the taxable person within the territory of the country under the conditions laid down in … Article 28c(A),

…'

9. The first subparagraph of Article 28a(6) of the Sixth Directive provides:

'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.'

10. Finally, Article 28a(7) of the Sixth Directive provides:

'Member States shall take measures to ensure that transactions which would have been classed as "supplies of goods" as defined in paragraph 5 or Article 5 if they had been carried out within the territory of the country by a taxable person acting as such are classed as "intra-Community acquisitions of goods".'

The place of supply and of intra-Community acquisition of goods

11. The place of a transaction for VAT purposes determines the Member State in which the VAT arising from the occurrence of a chargeable event is payable.

12. In accordance with Article 8(1)(a) of the Sixth Directive, the place of supply of goods is deemed to be:

'(a) 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 where the goods are at the time when dispatch or transport to the person to whom they are supplied begins. …'

13. Article 28b(A)(1) of the Sixth Directive, on the other hand, defines the place of the intra-Community acquisition of goods as follows:

'The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.'

Exemption

14. In accordance with Article 28c(A) of the Sixth Directive, in trade between Member States the cross-border supply of goods is exempt from value added tax in certain cases:

'Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Article 5, dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods. …

…'

Deduction of input tax

15. Finally, the provisions concerning the right to deduct input tax, in particular the arrangements for exercising that right, are also relevant in the present case.

16. Pursuant to Article 17(2)(a) of the Sixth Directive, in the version of Article 28f(1) thereof, every taxable person is entitled, inter alia, to deduct, by way of input tax, 'value added tax … paid within the territory of the country in respect of goods or services supplied to him by another taxable person' (inputs) 'in so far as the goods and services are used for the purposes of his taxable transactions' (outputs).

17. Article 17(3)(a) of the Sixth Directive, in the version of Article 28f(1), states that that right to deduct input tax also exists where the outputs relate to 'economic activities … carried out in another country, which would be deductible if they had been performed within the territory of the country'.

18. In accordance with the first subparagraph of Article 18(2) of the Sixth Directive, the right to deduct is, in principle, exercised by the taxable person 'by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which … the right to deduct has arisen'. Pursuant to Article 18(4) of the Sixth VAT Directive, if the amount of the deduction to which the taxable person is entitled exceeds the amount of the tax due, the surplus is in principle refunded to the taxable person.

19. The first indent of the first subparagraph of Article 17(4) of the Sixth Directive, in the version of Article 28f(1), provides, however, that the 'refund of value added tax' referred to in Article 17(3) is to 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 Directive 79/1072/EEC'.

20. In accordance with Article 1 of 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[4] ('the Eighth Directive'), referred to above, '"a taxable person not established in the territory of the country" shall mean a person … who [in the refund period] has had in that country neither the seat of his economic activity nor a fixed establishment … and who, during the same period, has supplied no goods or services deemed to have been supplied in that country …'.

III – **Main proceedings**

21. The company Fonderie 2A ('Fonderie 2A') has its seat in Italy. In the year at issue, 2001, it manufactured metal parts in that country, and it sold them in the same year to the company Atral, which was established in France ('Atral').

22. The metal parts made their way from Fonderie 2A in Italy to Atral in France by the following route. First, Fonderie 2A dispatched the metal parts to the company Saunier-Plumaz, also established in France. The latter carried out painting work on the metal parts on behalf of Fonderie 2A. The metal parts were then dispatched from Saunier-Plumaz's place of business to the purchaser, Atral.

23. The main proceedings concern the refund of the French value added tax in the amount of EUR 44 348.49 which was charged to Fonderie 2A by Saunier-Plumaz for the painting work. It is common ground that Fonderie 2A is in principle entitled to deduct input tax in that regard. What is in dispute, however, is whether, in the present case, the right to deduct also entitles Fonderie 2A to a refund of that amount.

24. Fonderie 2A bases its right to such a refund from the French Republic on the refund arrangements pursuant to the Eighth Directive. Under Article 1 thereof, the application of those arrangements presupposes, however, that Fonderie 2A did not carry out any taxable transactions in France in the relevant period.

25. The French tax authorities, on the other hand, take the view that, in dispatching the painted metal parts onwards from Saunier-Plumaz's place of business to Atral, Fonderie 2A effected a taxable supply of goods in France. If that is the case, in order to be able to exercise its right to deduct input tax, Fonderie 2A would have had to submit a tax return in France in which it would also have had to declare the taxable supply of goods in that country. Fonderie 2A would then have been able only to deduct from the value added tax payable on that basis the amount of input tax to which it was entitled.

4 — OJ 1979 L 331, p. 11.

IV – **Proceedings before the Court of Justice**

26. Against that background, the Conseil d'État (Council of State), before which the dispute has now been brought, has referred the following question to the Court of Justice pursuant to Article 267 TFEU:

'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?'

27. In the proceedings before the Court of Justice, observations have been submitted by the French Republic and the Commission both in writing and by way of oral argument at the hearing. The appellant in the main proceedings, Fonderie 2A, and the Hellenic Republic have submitted only written observations.

V – **Legal assessment**

28. The referring court wishes to ascertain where, in the situation at issue in the main proceedings, the place of the supply of metal parts effected by the Italian vendor, Fonderie 2A, to the French purchaser, Atral, is located for the purposes of value added tax.

29. Fonderie 2A takes the view that the place of supply is in Italy.

30. In that event, Fonderie 2A would be eligible, in Italy, for the tax exemption for intra-Community supplies provided for in Article 28c(A)(a) of the Sixth Directive. The purchaser, Atral, would then have to pay tax in France on an intra-Community acquisition, in accordance with Article 28a(1)(a) of the Sixth Directive, but would at the same time, in principle, be able to exercise the right to deduct that value added tax as input tax. [5]

31. Under the system for charging value added tax on intra-Community trade, that exemption from tax in the Member State of origin and the taxation of the acquisition in the Member State of destination serve to release the goods from any tax burden in the Member State of origin and to place them in the fiscal custody of the Member State of destination alone. [6] At the same time, this system is intended to relieve the supplier established in the Member State of origin of the need to comply with tax obligations in the Member State of destination. Instead, those obligations have to be fulfilled by the person acquiring the goods through the payment of tax on an intra-Community acquisition.

32. The French Republic, the Hellenic Republic and the Commission, on the other hand, consider that the place of supply of the metal parts for the purposes of value added tax is in France.

33. In that event, Fonderie 2A would have to pay tax in France on a supply of goods for consideration, in accordance with Article 2(1) of the Sixth Directive, for which no tax exemption would be applicable. Fonderie 2A would, however, have been able to charge the value added tax incurred directly to its purchaser, Atral, since Atral would in principle be entitled to deduct it as input tax. [7] Since Fonderie 2A would have to pay tax on the supply in France, Atral would not have to pay tax on the acquisition of the goods.

5 — Pursuant to Article 17(2)(d) of the Sixth Directive, in the version of Article 28f(1).

6 — See in this regard my Opinion in *EMAG Handel Eder* (C-245/04, EU:C:2005:675, points 19 to 25).

7 — In accordance with Article 17(2)(a) of the Sixth Directive, in the version of Article 28f(1).

34. Consequently, if the place of supply of the metal parts were in France and not in Italy, there would under normal circumstances be no difference, from an economic point of view, in the tax burden borne by either Fonderie 2A or Atral. Furthermore, here too, it would fall to France as the Member State of destination to tax the sale. The only essential difference is that, in that event, the vendor, Fonderie 2A, which is established outside France, would itself have to declare the transaction in France and pay the value added tax there.

35. I too consider that the place of supply of the metal parts for the purposes of value added tax is in France. I shall substantiate that view by interpreting Article 8 of the Sixth Directive, which governs the place of supply of goods (see in this regard section A).

36. The Commission, however, has based its view, which ultimately accords with mine, not on Article 8 of the Sixth Directive but on the chargeable events of intra-Community transfer and use of goods provided for in Article 28a(5) and (6) of the Sixth Directive. Since that approach has been the subject of lengthy debate, in particular at the hearing, I shall extend my reasoning to include comment on this matter too (see in this regard section B).

A – *The place of supply of goods under the first sentence of Article 8(1)(a) of the Sixth Directive*

37. In the situation at issue in the main proceedings, the place of supply of goods for the purposes of value added tax is determined by the first sentence of Article 8(1)(a) of the Sixth Directive. This states that, in the case of the dispatch of goods, the place of supply is 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*. The French Republic and the Hellenic Republic have rightly pointed out in this regard that that provision is applicable irrespective of whether the supply of goods in question is cross-border or purely domestic.

38. It is therefore necessary to determine where the dispatch of the metal parts to the person acquiring them, Atral, *began* in this case. Did it begin in Italy, when the supplier, Fonderie 2A, dispatched those goods to Saunier-Plumaz in France for painting, or did it begin only in France, when the metal parts, now painted, were forwarded to the person acquiring them, Atral?

39. In this connection, the French Republic and the Hellenic Republic have expressed the view that dispatch to the person acquiring the goods cannot begin before the goods are finished products or are in a consumable condition. Since the metal parts were not in such a condition until after they had been painted by Saunier-Plumaz in France, dispatch to the person acquiring them, too, cannot have begun until that point in time. The place of supply of the metal parts, they submit, is therefore in France.

40. In essence, I agree with this view.

41. Since the first sentence of Article 8(1)(a) of the Sixth Directive refers to the beginning of the dispatch of the goods 'to the person to whom they are supplied', the goods must at that point in time be in the condition stipulated by the contract. This need not mean that they are finished or consumable products, since intermediate products, too, may be the subject of a supply. However, if the goods are not yet in the condition stipulated by the contract, then they are also not yet dispatched for the purpose of transfer to the person acquiring them within the meaning of Article 5(1) of the Sixth Directive but only for the purpose, if this is the case, of putting them into the condition stipulated by the contract, as is true of the painting of the metal parts in the present case.

42. Such reliance, as the point of reference, on the contractually-stipulated condition of the goods provides a clear criterion for determining when dispatch or transport begins. A clear criterion is necessary because this decides the place of supply of the goods for value added tax purposes and that place determines which Member State is entitled to the value added tax on the supply of the goods.

There is a particular need for legal certainty here. Without it, there is a risk of double taxation or non-taxation as a result of differing assessments by the Member State of origin and the Member State of destination. In the common system of value added tax, double taxation and non-taxation are to be avoided. [8]

43. Furthermore, the Court has already held, in connection with the permissible duration of a intra-Community transport, that the classification of a transaction as an intra-Community supply of goods requires a temporal and material link between the supply of the goods and their transport. [9] A material link between the cross-border dispatch and the supply of the goods to the person acquiring them must therefore be required in the present situation, too.

44. There is no adequate material link, however, if the initial purpose of the cross-border dispatch is the processing of the goods. In that case, the dispatch is materially linked first and foremost to the processing of the goods, not to their supply to the person acquiring them. In the present case, since that processing could also have been undertaken by a painter in another Member State, it was more by chance than anything else that the metal parts had already been dispatched to the Member State of the person acquiring them.

45. An adequate material link between the dispatch of the goods and their supply therefore arises only where the goods are dispatched to the person acquiring them in the condition stipulated by the contract. Since this happened in the present case only in France, after the metal parts had been painted, dispatch to the person acquiring the goods also began only in that country. In accordance with the first sentence of Article 8(1)(a) of the Sixth Directive, the place of supply of the goods is therefore in France, which is also where the tax on that supply must be paid.

46. It must not be overlooked that the solution proposed here raises problems from the point of view of the functioning of the internal market. Thus, in the present case, the supplier, Fonderie 2A, can avoid the administrative burdens associated with taxation in France by choosing a painter established in Italy and dispatching the metal parts to the person acquiring them in France from there. In that event, the place of supply of the goods for the purposes of value added tax would be Italy, where Fonderie 2A would be eligible for the tax exemption for intra-Community supplies of goods provided for in Article 28c(A)(a) of the Sixth Directive. [10] This would spare Fonderie 2A the need to pay tax on the supply of the metal parts in France. There may on occasion, therefore, be an incentive for suppliers to use service providers in their own Member State in order to avoid having to fulfil tax obligations in another Member State.

47. That said, the alternative would, in effect, be that every cross-border transport or dispatch of goods in an ongoing production process which has as its ultimate end point delivery to the person acquiring the goods could potentially qualify for the tax exemption applicable to intra-Community supplies. However, this would have the effect, in particular, of causing the close temporal link between the cross-border transport or dispatch, which would trigger the tax exemption, on the one hand, and the declaration of an intra-Community acquisition by the person acquiring the goods, on the other, to be lost. The loss of that link could be seriously deleterious to the supervision of intra-Community trade, in particular where this serves to prevent fraud. The Commission has rightly pointed out in this regard that, in the system for charging value added tax on intra-Community trade, particular value must be attached to effective fiscal supervision. [11]

8 — See in this regard, in the context of the determination of the place of a service, my Opinion in *Welmory* (C-605/12, EU:C:2014:340, points 23 to 26 and the case-law cited).

9 — Judgment in *X* (EU:C:2010:693, paragraph 33).

10 — See point 30 above.

11 — See, in particular, the introductory sentence of Article 28c(A) of the Sixth Directive and the 12th recital in the preamble to Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1), which introduced the transitional arrangements for the taxation of trade between Member States.

48. In conclusion, the answer to the question referred for a preliminary ruling must therefore be that transport or dispatch of goods to the person to whom they are supplied within the meaning of the first sentence of Article 8(1)(a) of the Sixth Directive cannot begin until the goods are in the condition stipulated by the contract. It follows that, in the situation at issue in the main proceedings, the place of supply of the metal parts for the purposes of value added tax is in France.

B – *The relevance of the chargeable events of intra-Community transfer and use of goods provided for in Article 28a(5) and (6) of the Sixth Directive*

49. In the Commission's view, however, the foregoing conclusion does not follow from an interpretation of the first sentence of Article 8(1)(a) of the Sixth Directive. It follows rather from consideration of the chargeable events of intra-Community transfer and use of goods provided for in Article 28a(5) and (6) of the Sixth Directive, which, it submits, were wrongly disregarded in the main proceedings.

50. The Commission considers the dispatch of the metal parts from Italy for the purpose of being painted by Saunier-Plumaz in France to be an intra-Community transfer, as provided for in Article 28a(5)(b) of the Sixth Directive, which is in principle subject to value added tax in the Member State of origin, Italy. At the same time, it argues, there is also an intra-Community use, as provided for in the first subparagraph of Article 28a(6) of the Sixth Directive, on which Fonderie 2A must pay tax in the Member State of destination, France. The supply of those goods to Atral is taxable, in France, only after the metal parts have been transferred and used in this way.

51. The chargeable events cited by the Commission are not relevant to the present case, however.

52. After all, the sale of the metal parts by Fonderie 2A to Atral satisfies in any event the requirements of the chargeable event of a supply of goods for consideration provided for in Article 2(1) of the Sixth Directive. It is also necessary, therefore, to establish the place of that transaction for the purposes of value added tax. The place of a supply of goods, however, is determined solely by the provisions of Article 8 of the Sixth Directive. Whether there are also other chargeable events such as intra-Community transfer or use is therefore irrelevant for the purposes of establishing the place of a taxable supply of goods under Article 2(1) of the Sixth Directive.

53. It must also be borne in mind, first, that in the present case the question of whether the requirements of the chargeable event of intra-Community *transfer* provided for in Article 28a(5)(b) of the Sixth Directive are satisfied cannot be answered at all without first establishing the place of supply of the metal parts. For, in accordance with the third indent of Article 28a(5)(b) of the Sixth Directive, these requirements are not satisfied if the goods are, for the purposes of their supply, dispatched by the taxable person within the territory of the country under the conditions laid down in Article 28c(A) of the Sixth Directive. Thus, an intra-Community transfer is not taxable, in particular, where the transfer takes place within the context of an exempt intra-Community supply of goods under Article 28c(A)(a) of the Sixth Directive.

54. However, there would have been a tax-exempt intra-Community supply of that kind if the place of supply of the metal parts had been established as being in Italy in accordance with the first sentence of Article 8(1)(a) of the Sixth Directive. Contrary to the view taken by the Commission, the tax exemption provided for in Article 28c(A)(a) of the Sixth Directive would not, in the present case, have been precluded by the fact that ownership was not transferred to Atral until after the point in time at which the metal parts crossed the border. Neither the wording of the first subparagraph of Article 28c(A)(a) of the Sixth Directive nor the case-law of the Court[12] supports the inference of a

12 — See judgments in *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 70) and *VSTR* (EU:C:2012:592, paragraphs 29 and 30).

requirement as to the time of the transfer of ownership.[13] On the contrary, that provision expressly provides for the possibility of the goods being transported by the vendor himself. If the vendor does transport the goods over the border himself, however, the person acquiring them cannot at that point in time have yet acquired the right to dispose of the goods as owner.

55. Second, the question whether, in the present case, Fonderie 2A satisfied, in France, the requirements of the chargeable event of intra-Community *use* provided for in the first subparagraph of Article 28a(6) of the Sixth Directive can also be left unanswered. This is a very moot point, given the unclear wording of that provision[14] and its relationship with the chargeable event provided for in Article 28a(7) of the Sixth Directive. An answer to that question is in any event, however, of no relevance either to the reply to the question referred for a preliminary ruling or to the judgment in the main proceedings. Since, as I have shown,[15] the metal parts were supplied in France, the refund arrangements under the Eighth Directive are not applicable in the present case anyway.

VI – **Conclusion**

56. In conclusion, I propose that the Court answers the question referred for a preliminary ruling by the Conseil d'État as follows:

The first sentence of Article 8(1)(a) of the Sixth Directive must be interpreted as meaning that transport or dispatch of goods to the person to whom they are supplied cannot begin until the goods are in the condition stipulated by the contract. In the situation at issue in the main proceedings, the place of supply of the metal parts for the purposes of value added tax is therefore in France.

13 — According to case-law, the question of when or where the right to dispose of the goods as owner was transferred is potentially relevant only where a single intra-Community transport must be ascribed to two supplies of goods, the one following immediately on the other (see judgment in *Euro Tyre Holding* (EU:C:2010:786, paragraph 45)). The present case, however, concerns only one supply of goods.

14 — See not least the differences in the wording of the German and French versions of Article 28a(6) of the Sixth Directive, one of which refers to a use of goods by a taxable person 'in seinem Unternehmen' (within his undertaking), while the other refers in much broader terms to use 'aux besoins de son entreprise' (for the purposes of his undertaking).

15 — See points 37 to 48 above.