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SOCIÉTÉ GÉNÉRALE DES GRANDES SOURCES D'EAUX MINÉRALES: FRANÇAISES v BUNDESAMT FÜR FINANZEN[1]

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As with most cases argued before the European Court of Justice, the more you look into them the more you discover. This case is no exception. On the face of it, this case considers whether a Member State has an obligation to accept duplicate invoices for the purpose of obtaining a refund under the Eighth Directive.

Société Générale des Grandes Sources d'Eaux Minerales Française ("SGS") is a French incorporated company and for the purposes of VAT belongs in France. It terminated a dealership agreement pursuant to which it agreed to pay a German company an amount of money. As this was a service for VAT purposes and as the supplier of the service belonged in Germany then German VAT was payable.[3] SGS, not being established in Germany could not therefore recover this VAT in its own VAT return but had to make an application pursuant to the Eighth VAT Directive[4] for a refund.

The Eighth Directive states in Article 3 that:

> "To qualify for a refund, any taxable person ... shall: (a) submit to the competent authority ... an application modelled on the specimen contained in Annex A, attaching originals of invoices...".

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1 Case C-361/96 [1998] ECR I-3495.

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3 See Article 9.1 Sixth VAT Directive EC/77/388.

4 Directive EC/79/1072.

The difficulty here was that the original invoice had been lost in the post between SGS and their lawyers who were to submit the claim on their behalf. Accordingly, the German tax authorities refused to refund the VAT as the requirements of the Eighth Directive (which had been faithfully transcribed into German law) were not met.

Points of law

Two arguments were raised on behalf of SGS. The first was whether the tax authorities were obliged to insist on an original invoice. The second was a non-discrimination argument in that had SGS been a German company then, under German law, the requirement for the original invoice could be waived in favour of a duplicate one.

The first point is rather tricky as there are a number of permutations. Given the wording of the Directive are Member States prohibited from accepting anything other than the original invoice, or are they permitted to accept duplicates or must they accept duplicates? Indeed as the Advocate General pointed out, the referring court raised four possible interpretations – requires, permits, proposes or even suffers.

Further the wording of the Sixth and Eighth Directives are markedly different on the requirement for documentary evidence to justify a refund of tax. The former refers to a document[5] which contains certain specified information,[6] whilst the latter refers to an original invoice.[7]

Is there any significance to be attached to the different wording in the context of allowing a duplicate?

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5 This in the author's view permits Member States to allow those documents to be electronic ones.

6 The Advocate General in paragraph 8 of his Opinion (p.3501 *supra*) states that there is no definition in the Sixth Directive of an invoice but I would disagree – a document which contains the relevant information is an invoice. However, in practice each Member State adds a number of its own particular requirements before a document can constitute an invoice for the purposes of VAT recovery.

7 Which in the author's view would not permit an electronically transmitted invoice as there is no clear answer to the question as to which print of the electronic document, and by whom it must be printed, is the original. Logic dictates that the original should be printed by the supplier but if he does this it rather defeats the purpose of transmitting it electronically.

The Court had a fine line to tread. Fairness would say no, but how do you prevent opening the floodgates to multiple claims and fraud. Indeed the German authorities said that fraud was already rife from companies in other countries not under the supervision of the German tax authorities. I was more than a little surprised to read this as this is a fraud I have not seen in practice.

The Decision

The decision of the European Court of Justice is very narrow in its application. It states that Member States may, but are not obliged to, allow the use of duplicate invoices in accepting a claim for refund under the Eighth Directive provided they are (1) happy that there is no risk of a double refund i.e. giving a refund on the original invoice and then on the copy, (2) that the loss of the original documentation was beyond the control of the taxpayer and (3) that the transaction had genuinely occurred. Given that this merely says it is in order for the Member States to do this it is still hedged around with a lot of qualifications. The very clear message from the European Court is do not lose your original documents. This must be backed up with the fact that in practice one must make sure that one's original documents are in perfect order otherwise the claim will be rejected.

The other point upon which the Court decided is the one of discrimination. As mentioned above, there is provision in Germany which would allow a German company to submit a duplicate invoice and still recover input tax. The point was whether by not permitting a non-German company to do this in respect of the Eighth Directive the German tax authorities were acting in a discriminatory manner contrary to the Treaty of Rome.

The Court felt that although the wording in the Eighth Directive specifically referred to attaching original invoices whereas the wording in the Sixth Directive (which of course is applicable to the domestic German transactions) did not, this did not make any difference as the right to deduct input tax was fundamental to the workings of the VAT system throughout Europe regardless of where the taxpayer was established. The Court held that the German tax authorities were not allowed to discriminate in this way but one questions whether SGS recovered their money because at the end of the day, on my understanding, the ability to use a duplicate invoice was only permitted by way of concession and not by way of a legal right[8]. It is therefore perfectly possible for the German tax authorities to say in response to

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8 I have checked with my German colleagues who took the case. At the time of writing, the case had been remitted to the German court which was considering, *inter alia*, the double refund issue.

the European Court decision that they are not satisfied that there is no risk of double tax (although given the publicity in this case it is hard to see how they could sustain that) and that even though the European Court permits them to accept a duplicate, they are not obliged to and they are also not obliged to provide a concession provided they do not do so in a discriminatory way. What I mean by this is that provided they i.e. the German tax authorities, can establish a reason why they would deny a German company the use of the duplicate invoice, then they could legitimately deny SGS the use of that concession. Looked at in this light one can see that the decision is a very narrow one given that whilst on the face of it, the taxpayer appears to have won the battle, he could still well lose the war.

Proportionality and Equity

For me the most interesting points about this decision were not those relating to the specific point itself but the discussion of the concepts of proportionality and equity in European law. Proportionality is well established as a principle of European law and has been applied in a number of Member States without recourse to the European Courts. Its application in this case is clear in that failing to comply with very rigid and dare one say, archaic technical requirements resulted in the taxpayer being denied his fundamental right to recover input tax which was attributable to his taxable activities. The punishment is therefore disproportionate to the mischief.

Of more interest to me is the concept of equity as known in German domestic law. Whilst the European Court did not immediately accept this as a new principle of European law I have no doubt that we will see it again particularly now awareness of it has been raised throughout the Community in this case. From my own position domestically in the United Kingdom I can see some interesting arguments ahead where the UK tax authorities seek to rely on the strict letter of the law and create injustice when it may well be that a European Court will accept that an overriding principle of tax and equity should apply to ensure that the scheme of the Directives is fulfilled. It may be that the principle of equity is not required given the teleological approach to the interpretation of the Directives in that if a taxing authority is construing the Directive harshly and in a way which fundamentally undermines the taxpayers' "apparent" rights under the Directive then it is always open to the Court to interpret the provisions in favour of the taxpayer.