

Case C-291/07 ***Kollektivavtalsstiftelsen TRR*** ***Trygghetsrådet***

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In this case the ECJ addressed the place of supply rules for certain cross-border services where the customer uses the services only for the purposes of activities which are not subject to VAT. Its decision is designed to achieve simplicity, but may in fact cause practical problems. It also highlights potential shortcomings in Directive 2008/8, which will amend the rules regarding the place of supply of services with effect from 1 January 2010.

Facts

The *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (Council for Redundancy Support and Advice, or "TRR") is a foundation formed on the basis of collective agreements between representatives of Swedish employers (the Confederation of Swedish Enterprise, *Svenskt Näringsliv*) and employees (the Federation of Salaried Employees, or *Privattjänstemannakartellen*). TRR's functions include providing redundancy payments and assisting jobseekers, both activities which are not subject to VAT. It also provides services to business, for example in connection with outsourcing, services which are subject to VAT. In total, 5% of its activities are taxable.

TRR proposed to obtain consultancy services from a provider based in Denmark, for the purposes of its non-taxable activities. It sought a ruling from the Swedish tax authorities on its VAT position in so doing. On appeal, the Swedish court referred to the ECJ questions as to the *place of supply* of consultancy services provided by a supplier based in Denmark to TRR in Sweden.

The ECJ's judgment

The ECJ observed first that the relevant provisions of Directive 77/388 ("the Sixth VAT Directive") and its successor, Directive 2006/112 ("the Principal VAT Directive") were essentially identical and fell to be interpreted in the same way. Both laid down a general rule to the effect that "[t]he *place of supply of services shall be deemed to be the place where the supplier has established*

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his business"¹. However both also contained divergent provisions for certain cross-border supplies. In particular, Article 56(1)(c) of the Principal VAT Directive² provided as follows:

"The place of supply of the following services [...] to 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 for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides:

[...]

(c) the services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the provision of information".

Where that provision applies, the obligation to account for VAT falls not on the supplier but on the customer: see Article 196 of the Principal VAT Directive³.

The question for present purposes was whether Article 56(1)(c) applied (and in particular whether TRR was a *taxable person* within the meaning of that provision) where TRR was purchasing consultancy services solely for the purpose of activities falling outside the Principal VAT Directive.

The ECJ observed that Article 56 did not make express reference to the purpose for which the taxable person was using the supply, and did not (unlike Article 2(1)(a) of the Principal VAT Directive, for example) require that the *taxable person be acting as such*.

It followed that *"the fact that the customer uses [the services supplied] for activities which fall outside the scope of [the Principal VAT Directive] does not preclude the application of [Art 56(1)(c)]"*⁴. In purchasing consultancy services for its non-taxable activities, TRR was therefore caught by Article 56(1)(c), the place of supply was its place of establishment, and it was liable to account for VAT on the supply pursuant to Article 196 of the Principal VAT Directive.

The ECJ added that that result was favourable in policy terms. Article 56 is a 'conflict of laws' rule designed to avoid the risk of double taxation or non-taxation. The interpretation of Article 56 adopted by the ECJ *facilitated the implementation* of that rule and *served the interests of simplicity of administration*, since the supplier simply needed to establish whether his customer is a taxable person in order to ascertain whether the place of supply is the supplier's Member State (under the general rule, where the customer is not a taxable person) or the customer's Member State (where the customer is a taxable person)⁵.

Furthermore the ECJ expressed the view that the interpretation of Article 56(1)(c) which it had adopted was consistent with the principle of legal certainty and reduced the burden on traders operating across Member State boundaries, thus facilitating the free movement of services⁶.

Comment

While the ECJ's stated aim was to achieve simplicity, its judgment may cause practical problems for self-employed individuals who are taxable persons in their business, but who may also buy cross-border services (for example accountancy or legal services) for their private purposes. A strict reading of the ECJ's judgment might deem those individuals to be taxable persons falling under Article 56(1)(c) when buying privately, with the consequence that they would need to account for the VAT due on the relevant supply (presumably as part of their business' VAT returns?).

This difficulty could be avoided if, for example, the self-employed individual could be a taxable person when acting in the course of business but a non-taxable person when acting in his or her private capacity. However it is far from clear that the ECJ's judgment allows of this possibility.

The ECJ's judgment also highlights a difficulty with the amendments to the Principal VAT Directive which are laid down by Directive 2008/8/EC and which will take effect from 1 January 2010. After that date, a new Article 43(1) of the Principal VAT Directive will provide that *"a taxable person who also carries out activities or transactions that are not considered to be taxable supplies [...] shall be regarded as a taxable person in respect of all services rendered to*

¹ Article 43 of the Principal VAT Directive; formerly Article 9(1) of the Sixth VAT Directive

² Formerly Article 9(2)(e) of the Sixth VAT Directive

³ Formerly Article 21(1)(b) of the Sixth VAT Directive

⁴ See paragraph 29 of the ECJ's judgment

⁵ See paragraphs 30 and 31 of the ECJ's judgment

⁶ See paragraph 33 of its judgment

him". That provision will be followed by two general rules: Article 44, which will lay down the place of supply of services "to a taxable person acting as such", and Article 45, governing the place of supply of services to a non-taxable person. Under the new Article 43(1) (which mirrors the ECJ's decision), an entity in TRR's position will be deemed to be a taxable person, but it will not be *acting as such*, with the consequence that there would appear to be no applicable rule regarding the place of supply.

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