

JUDGMENT OF THE COURT (Second Chamber)

17 September 2014 (*)

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — VAT group — Internal invoicing for services supplied by a main company with its seat in a third country to its branch belonging to a VAT group within a Member State — Whether services supplied are taxable)

In Case C-7/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the förvaltningsrätten i Stockholm (Sweden), made by decision of 28 December 2012, received at the Court on 7 January 2013, in the proceedings

Skandia America Corp. (USA), filial Sverige

v

Skatteverket,

THE COURT (Second Chamber),

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

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2014,

after considering the observations submitted on behalf of:

- Skandia America Corp. (USA), filial Sverige, by M. Wetterfors,
- the Skatteverket, by K. Alvesson,
- the Swedish Government, by A. Falk, acting as Agent,
- the German Government, by T. Henze, acting as Agent,
- the United Kingdom Government, by S. Brighthouse, acting as Agent, and by R. Hill, Barrister,
- the European Commission, by A. Cordewener and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2014,

gives the following

Judgment

1 This request for a preliminary ruling relates to the interpretation of Articles 2, 9(1), 11, 56, 193 and 196 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

2 The request has been made in proceedings between Skandia America Corp. (USA), filial Sverige ('Skandia Sverige'), and the Skatteverket (the Swedish tax authorities) regarding the latter's decision to charge value added tax ('VAT') on the supply of services by Skandia America Corp. ('SAC'), established in the United States, to its branch Skandia Sverige.

Legal context

Directive 2006/112

3 Article 2(1)(c) of the VAT Directive provides as follows:

'1. The following transactions shall be subject to VAT:

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such'.

4 The first subparagraph of Article 9(1) of the VAT Directive stipulates:

"'Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.'

5 Article 11 of the VAT Directive provides as follows:

'After consulting the advisory committee on value added tax ..., each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.'

6 Points (c) and (k) of Article 56(1) of the VAT Directive provide as follows:

'1. The place of supply of the following services to customers established outside the Community, or 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;

...

(k) electronically supplied services, such as those referred to in Annex II.'

7 Article 193 of the VAT Directive states as follows:

‘VAT shall 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.’

8 Article 196 of the VAT Directive provides as follows:

‘VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied or by any person identified for VAT purposes in the Member State in which the tax is due to whom the services referred to in Articles 44, 47, 50, 53, 54 and 55 are supplied, if the services are supplied by a taxable person not established in that Member State.’

9 Annex II to the VAT Directive, entitled ‘Indicative list of the electronically supplied services referred to in point (k) of Article 56(1)’, provides as follows:

- ‘(1) Website supply, web-hosting, distance maintenance of programmes and equipment;
- (2) supply of software and updating thereof;
- (3) supply of images, text and information and making available of databases;
- (4) supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events;
- (5) supply of distance teaching.’

10 On 2 July 2009, the European Commission adopted a communication explaining its position to the Council and the European Parliament on the VAT group option provided for in Article 11 of the VAT Directive (COM(2009) 325 final).

Swedish law

11 The VAT Directive was transposed by Law (1994:200), on Value Added Tax (mervärdesskattelagen (1994:200)), (the ‘Law on VAT’).

12 Chapter 1, Paragraph 1, of that Law seeks to transpose Article 2(1) of the VAT Directive by providing that VAT is payable to the State in respect of any supply of services within the country which is taxable and performed in the course of an economic activity.

13 Paragraph 2, first subparagraph, point (1), of that Chapter, whose purpose is to transpose Articles 193 and 196 of the VAT Directive, provides that anyone who carries out a supply of services within the meaning of Paragraph 1 of that Chapter is required to pay the VAT on that transaction unless the transaction is amongst those referred to in points (2) to (4) of that first subparagraph. It follows from point (2) of that first subparagraph that the purchaser of services covered by Chapter 5, Paragraph 7, of the Law on VAT, from a foreign undertaking, is required to pay VAT on the purchase.

14 Under Paragraph 15 of Chapter 1 of the Law on VAT, a foreign taxable person is an operator which does not have its seat of economic activity, or a fixed establishment, in Sweden and is not permanently resident or habitually resident in Sweden.

15 Chapter 5, Paragraph 7, first subparagraph, of that law, intended to transpose Article 56 of the VAT Directive, provides that the services listed in the second subparagraph are deemed to be

supplied within Sweden if they are supplied from a country outside the European Union and the purchaser is an economic operator which has its seat of economic activity in Sweden. The services covered in the second subparagraph of Paragraph 7 include, inter alia, consultancy services and similar services and electronically supplied services for the distance maintenance of programmes and for the supply and updating of software.

16 As regards the concept of a group of persons which may be considered to be a sole taxable person for VAT purposes ('the VAT group'), the Kingdom of Sweden, exercising the option provided for in Article 11 of the VAT Directive, adopted Chapter 6a, Paragraphs 1 to 4, of the Law on VAT pursuant to which two or more economic operators may be regarded as a single operator, that is to say, a VAT group, and the activity in which they are engaged may be regarded as a single activity. It follows from those provisions that only the fixed establishment, in Sweden, of an economic operator may belong to a VAT group, and such a group may consist only of economic operators which are closely bound to one another by financial, economic and organisational links. Under the same provisions, a VAT group is created on the basis of a decision to register by the Skatteverket following an application from the members of the group concerned.

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

17 In 2007 and 2008, SAC was the global purchasing company for IT services for the Skandia group and carried out its activities in Sweden through its branch, Skandia Sverige. SAC distributed externally-purchased IT services to various companies in the Skandia group and to Skandia Sverige which, since 11 July 2007, has been registered as a member of a VAT group. Skandia Sverige was tasked with processing the externally-purchased IT services to produce the final product, 'IT-production' (IT-produktion). That final product was then supplied to various companies in the Skandia group, both within and outside the VAT group. A mark-up of 5% was charged on each supply of services, both between SAC and Skandia Sverige and between the latter and other companies in the Skandia group. Costs were allocated between SAC and Skandia Sverige by the issue of internal invoices.

18 The Skatteverket decided to charge VAT on the supplies of IT services from SAC to Skandia Sverige in the 2007 and 2008 financial years. That tax authority, taking the view that those supplies constituted taxable transactions, considered SAC to be liable for VAT. Consequently, Skandia Sverige was identified as also liable for VAT and it was charged the amount of tax relating to those supplies on the ground that it was SAC's branch in Sweden.

19 Skandia Sverige brought an action against those decisions before the referring court.

20 In those circumstances the förvaltningsrätten i Stockholm (Stockholm Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do supplies of externally purchased services from a company's main establishment in a third country to its branch in a Member State, with an allocation of costs for the purchase to the branch, constitute taxable transactions if the branch belongs to a VAT group in the Member State?

(2) If the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within the meaning of Article 196 of [the VAT Directive], with the result that the purchaser is to be taxed for the transactions?'

Consideration of the questions referred

21 By its first question, the referring court asks, in essence, whether Articles 2(1), 9 and 11 of the VAT Directive must be interpreted as meaning that supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a VAT group.

22 In this connection, it must be recalled that Article 2(1) of the VAT Directive states that, *inter alia*, the supply of services for consideration within the territory of a country by a taxable person acting as such is to be subject to VAT.

23 Article 9 of the VAT Directive defines 'taxable person'. This is any person who carries out any economic activity 'independently'. It is especially important for the uniform application of the VAT Directive that the notion of 'taxable person', defined in Title III thereof, is given an autonomous and uniform interpretation.

24 According to the Court's case-law, a supply of services is taxable only if there exists between the service supplier and the recipient a legal relationship in which there is a reciprocal performance (judgment in *FCE Bank*, C?210/04, EU:C:2006:196, paragraph 34 and the case-law cited).

25 To establish whether such a legal relationship exists between a non-resident company and one of its branches established in a Member State so that the supplies made may be liable to VAT, it is necessary to determine whether that branch carries out an independent economic activity. It is necessary in that regard to determine whether that branch may be regarded as being independent, in particular in that it bears the economic risk arising from its business (judgment in *FCE Bank*, EU:C:2006:196, paragraph 35).

26 As a branch of SAC, Skandia Sverige does not operate independently and does not itself bear the economic risks arising from the exercise of its activity. In addition, as a branch, according to the national legislation, it does not have any capital of its own and its assets belong to SAC. Consequently, Skandia Sverige is dependent on SAC and cannot therefore itself be characterised as a taxable person within the meaning of Article 9 of the VAT Directive.

27 So far as concerns the existence of an agreement on the sharing of costs, which took the form in the case in the main proceedings of the issue of internal invoices, this is also irrelevant when such an agreement has not been negotiated between independent parties (*FCE Bank*, EU:C:2006:196, paragraph 40).

28 However, it is common ground that Skandia Sverige is a member of a VAT group, created on the basis of Article 11 of the VAT Directive and therefore forms with the other members a single taxable person. For VAT purposes, that VAT group was allocated a registration number by the competent national authority.

29 In this connection, treatment as a single taxable person precludes the members of the VAT group from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations (judgment in *Ampliscientifica and Amplifin*, C?162/07, EU:C:2008:301, paragraph 19). It follows that, in such a situation, the supplies of services made by a third party to a member of a VAT group must be considered, for VAT purposes, to have been made not to that member but to the actual VAT group to which that member belongs.

30 Therefore, for VAT purposes, the services supplied by a company such as SAC to its branch which, such as Skandia Sverige, belongs to a VAT group, are considered not to be supplied to that

branch but must be regarded as being supplied to the VAT group.

31 Inasmuch as the services provided for consideration by a company such as SAC to its branch must be deemed, solely from the point of view of VAT, to have been provided to the VAT group, and inasmuch as that company and that branch cannot be considered to be a single taxable person, it must be concluded that the supply of such services constitutes a taxable transaction, under Article 2(1)(c) of the VAT Directive.

32 Having regard to all the foregoing considerations, the answer to the first question is that Articles 2(1), 9 and 11 of the VAT Directive must be interpreted as meaning that supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a VAT group.

The second question

33 By its second question, the referring court asks, in essence, whether Articles 56, 193 and 196 of the VAT Directive must be interpreted as meaning that, in a situation such as that in the main proceedings where the main establishment of a company in a third country supplies services for consideration to a branch of that company in a Member State and where that branch belongs to a VAT group in that Member State, that VAT group, as the purchaser of the services, becomes liable for the VAT payable.

34 Article 196 of the VAT Directive provides that, as an exception to the general rule in Article 193 of that Directive, according to which VAT is payable in a Member State by a taxable person carrying out a taxable supply of services, VAT is payable by the taxable person to whom those services are supplied where the services referred to in Article 56 of that directive are supplied by a taxable person which is not established in that Member State.

35 In that regard, it is sufficient to note that, as is apparent from paragraph 31 above, a supply of services such as that at issue in the main proceedings constitutes a taxable transaction, under Article 2(1)(c) of the VAT Directive, and that the VAT group to which the branch receiving those services belongs is deemed, for VAT purposes, to be the person to whom those services are supplied.

36 Furthermore, it is not disputed that the services supplied in the case in the main proceedings are among those mentioned in Article 56 of the VAT Directive.

37 In those circumstances, and where it is also not disputed that the company which supplied those services is located in a third country and that it constitutes a separate taxable person from the VAT group, it is that group which, as the purchaser of the services for the purposes of Article 56 of that directive, is liable for the VAT pursuant to the exception in Article 196 of the VAT Directive.

38 Having regard to the foregoing considerations, the answer to the second question referred for a preliminary ruling is that Articles 56, 193 and 196 of the VAT Directive must be interpreted as meaning that, in a situation such as that in the main proceedings where the main establishment of a company in a third country supplies services for consideration to a branch of that company in a Member State and where the branch belongs to a VAT group in that Member State, that VAT group, as the purchaser of those services, becomes liable for the VAT payable.

Costs

39 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:

1. **Articles 2(1), 9 and 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a group of persons whom it is possible to regard as a single taxable person for value added tax purposes.**
2. **Articles 56, 193 and 196 of Directive 2006/112/EC must be interpreted as meaning that, in a situation such as that in the main proceedings where the main establishment of a company in a third country supplies services for consideration to a branch of that company in a Member State and where the branch belongs to a group of persons whom it is possible to regard as a single taxable person for value added tax purposes in that Member State, that group, as the purchaser of those services, becomes liable for the value added tax payable.**

[Signatures]

* Language of the case: Swedish.