

JUDGMENT OF THE COURT (Third Chamber)

3 September 2015 (*)

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Articles 24(1), 25(b), 62(2), 63 and 64(1) — Meaning of ‘supply of services’ — Subscription contract for the supply of consulting services — Chargeable event — Need for proof of the actual supply of services — Chargeability of the tax)

In Case C-463/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad — Varna (Bulgaria), made by decision of 29 September 2014, received at the Court on 8 October 2014, in the proceedings

Asparuhovo Lake Investment Company OOD

v

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Third Chamber),

composed of M. Ilešić, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiusas and C.G. Fernlund (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2015,

after considering the observations submitted on behalf of:

- Asparuhovo Lake Investment Company OOD, by J. Fitsev,
- the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by A. Kirova, acting as Agent,
- the Greek Government, by K. Georgiadis and A. Magrippi, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, R. Campos Laires and A. Cunha, acting as Agents,
- the European Commission, by D. Roussanov and M. Owsiany-Hornung, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 24(1), 25(b), 62(2), 63 and 64(1) 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 Asparuhovo Lake Investment Company OOD (‘ALIC’) and the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Varna ‘Appeals and Tax and Social Security Practice’ Directorate at the central office of the National Revenue Agency; the ‘Direktor’) concerning the deduction of input value added tax (‘VAT’) levied on the purchase of consulting services by subscription.

Legal context

EU law

3 Article 2 of the VAT Directive provides:

‘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 Article 9(1) of the VAT Directive provides:

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

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

5 Article 24(1) of the VAT Directive is worded as follows:

“Supply of services” shall mean any transaction which does not constitute a supply of goods’.

6 Article 25 of the VAT Directive provides:

‘A supply of services may consist, inter alia, in one of the following transactions:

...

(b) the obligation to refrain from an act, or to tolerate an act or situation;

...’

7 Article 62 of the VAT Directive provides:

‘For the purposes of this Directive:

(1) “chargeable event” shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become “chargeable” when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred’.

8 Article 63 of the VAT Directive provides:

‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied’.

9 Article 64(1) of the VAT Directive reads as follows:

‘Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of Article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate’.

10 Article 66 of the VAT Directive provides that Member States may derogate ‘from Articles 63, 64 and 65 ... [and] provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

- (a) no later than the time the invoice is issued;
- (b) no later than the time the payment is received;
- (c) where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event’.

Bulgarian law

11 In accordance with Article 2 of the Law on VAT (Zakon za danâk vârhu dobavenata stoynost, DV No 63, of 4 August 2006; ‘the ZDDS’), in the version in force at the material time in the main proceedings:

‘The following shall be subject to [VAT]:

- 1. any supply of goods or services for consideration;

...’

12 Article 8 of the ZDDS provides:

‘[A] “service” for the purposes of this law is anything which has a value and which is distinct from goods and from money in circulation and foreign currencies which are used as a means of payment’.

13 Under Article 9 of the ZDDS:

(1) A “supply of services” shall be any performance of a service.

(2) The following shall also be regarded as a supply of services:

...

2. the entry into an obligation to refrain from certain acts or from exercising certain rights;

...’

14 Article 25 of the ZDDS provides:

(1) The “chargeable event” within the meaning of this law shall be a supply of goods or services which is carried out by a taxable person for the purposes of this law, an intra-Community acquisition or an importation of goods within the meaning of Article 16.

(2) The chargeable event shall occur on the date on which ownership of the goods is transferred or the service supplied.

...

(4) In respect of a supply occurring periodically, in stages or continuously, excluding supplies referred to in Article 6(2), each period or stage for which payment is agreed shall, taken individually, be regarded as a supply and the chargeable event corresponding to that supply shall occur on the date on which the payment becomes due.

...

(6) On the date on which the chargeable event occurs pursuant to paragraph 2, 3 or 4:

1. the tax on taxable transactions under this law shall become chargeable and the obligation, on the registered person, to invoice the tax shall arise ...

...’

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

15 ALIC is a Bulgarian company whose business is mainly concerned with agriculture, horticulture, livestock rearing and related activities.

16 On 1 August 2011, ALIC entered into subscription contracts for consulting services with four other companies, namely ‘Krestan Bulmar — Korporativni finansi’ EOOD, ‘Krestan Bulmar — Biznes razvitie’ EOOD, ‘Krestan Bulmar — Legakonsult’ EOOD and ‘Biznes Ekspres’ EOOD, (together the ‘service providers’), in the areas of corporate finance, commercial development, legal advice and information security, respectively. Those consulting companies were all represented by the same person. The parties terminated those contracts from 5 March 2012.

17 Under those contracts, the service providers undertook to:

- make themselves available to ALIC for consultation, meetings and commitments, on each working day from 9 a.m. to 6 p.m. and, when needed, outside office hours, including on Sundays and public holidays;
- where appropriate, ensure, during such time as necessary, the presence of a competent

person at ALIC's offices and/or those of a third party associated with ALIC, including outside office hours and on Sundays and public holidays;

- obtain documents and necessary information and exchange them between the parties in order to guarantee the fullest and most efficient protection possible of ALIC's interests, and
- transmit, in good time, to the customer, for consultation, negotiation and signature, all the necessary documents relating to the protection of the customer's interests.

18 The service providers declared that they had not entered into similar contracts with third parties whose interests were contrary to those of ALIC and/or which were competing directly with ALIC. They also undertook to refrain from entering into such contracts.

19 In exchange, ALIC undertook to pay them weekly remuneration, disbursed every Monday following the week for which it was due. ALIC deducted the VAT stated on the invoices issued by the service providers.

20 ALIC was the subject of a tax inspection covering the period from August to October 2011. During the inspection, the tax authorities found that the invoices had been issued within the period stated in the contracts, had been duly accounted for in the accounts both of the service providers and of ALIC and had been the subject of a VAT declaration. The tax authorities also noted that the invoices established by the service providers had been honoured by way of payments made by bank transfer. It was also established that the service providers had sufficiently qualified staff to provide the agreed services.

21 As regards the way in which those services were to be supplied, the service providers declared that the parties had not envisaged a formal documentary record being made of requests for those services and the provision thereof. The existing tasks and problems were examined at meetings, by telephone or by e-mail. The staff actually entrusted with performing those services stated that the customer communication manager assigned to them, via electronic communications, the various tasks to be carried out for ALIC.

22 The tax authorities took the view that no proof had been provided as to the type, quantity and nature of the services actually provided — in particular there was no first-hand document relating to the number of hours performed — and that no information had been given on how service prices had been set. On 1 August 2013, the tax authorities issued an adjusted tax notice refusing ALIC the right to deduct the VAT invoiced by the service providers, concerning the sum of 33 349 Bulgarian leva (BGN), about EUR 17 000.

23 ALIC challenged the adjusted tax notice before the Direktor. Since the latter upheld that notice by decision of 4 November 2013, ALIC brought an action before the referring court.

24 The referring court notes that the contracts entered into by ALIC defined only the scope of the consulting services and did not indicate any specific result to be achieved as regards the subject-matter, performance deadline, manner of receipt or unit price of those services. The court adds that the decision of the parties to pay for the services supplied by the service providers by means of a fixed sum paid at regular intervals shows that those parties had not connected the right to require payment of the remuneration to the achievement of a specific result; consequently, the referring court does not consider it appropriate to examine whether such results were actually achieved.

25 The referring court states that the tax authorities have never claimed that the supplies of services, in respect of which ALIC claims a right to deduct the input VAT, were fraudulent; nor

have those authorities provided any evidence to that effect.

26 The referring court states that it nevertheless has doubts as to whether a subscription contract, such as that at issue in the main proceedings, may constitute a ‘supply of services’ within the meaning of Article 24(1) and Article 25(b) of the VAT Directive, or whether only the supply of specific consulting services may constitute such a supply and give rise to the right to deduct VAT. In the first case, it also asks whether the chargeable event and the chargeability of the tax occur upon the expiry of the period in respect of which the payment has been agreed.

27 In those circumstances, the Administrativen sad (Administrative Court, Varna, Bulgaria) has decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should Article 24(1) and Article 25(b) of [the VAT] Directive ... be interpreted as meaning that the term “supply of services” also includes subscription contracts for the supply of consulting services such as those at issue in the main proceedings, namely where a supplier, having qualified personnel available for supplying the services, has agreed to be on call for the customer during the term of the contract and has undertaken to refrain from entering into contracts with a similar subject-matter with the customer’s competitors?

(2) Should Articles 63 and 64(1) of [the VAT] Directive ... be interpreted as meaning that, for subscribed consulting services, the chargeable event occurs on expiry of the period in respect of which the payment was agreed, irrespective of whether and how often the customer makes use of the supplier’s on-call services?

(3) Should Article 62(2) of [the VAT] Directive ... be interpreted as meaning that a person supplying services in connection with a subscription service contract is obliged to charge VAT for the services on expiry of the period in respect of which the subscription fee was agreed, or does this obligation arise only if the customer has made use of the consultant’s services over the corresponding taxable period?’

The questions referred

Admissibility

28 At the hearing before the Court, the Direktor argued that the questions referred to the Court were inadmissible on the ground that the main proceedings did not raise any question of law since all the parties involved were agreed upon the interpretation of the provisions of the VAT Directive at issue in those proceedings, but only questions of fact relating to the existence of evidence to establish whether consulting services had in fact been supplied by the service providers.

29 In that regard, it should be recalled that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. In addition, it is for the national courts to furnish the Court with the factual and legal information necessary to enable it to give useful answers to the questions referred (see, *inter alia*, judgment in *Rosado Santana*, C-177/10, EU:C:2011:557, paragraphs 32 and 33).

30 According to the referring court, it has not been shown either that the consulting services at issue in the main proceedings were not in fact supplied or that there was any fraud. Moreover, that

court has doubts on the application of VAT to subscription contracts for consulting services.

31 Consequently, the questions referred must be held to be admissible.

The first question

32 By its first question, the referring court asks, in essence, whether Article 24(1) and Article 25(b) of the VAT Directive must be interpreted as meaning that the term ‘supply of services’ includes subscription contracts for the supply of consulting services, in particular those of a legal, commercial or financial nature, under which a supplier has agreed to be available to the customer during the term of the contract and has undertaken to refrain from entering into contracts with a similar subject-matter with the customer’s competitors.

33 As a preliminary point, it should be recalled that under the VAT Directive — as under 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 (OJ 1977 L 145, p. 1) — the scope of VAT is very wide in that Article 2 of the VAT Directive, which concerns taxable transactions, refers not only to the importation of goods but also to the supply of goods or services for consideration within the territory of the country by a taxable person acting as such (judgment in *Future Health Technologies*, C?86/09, EU:C:2010:334, paragraph 25).

34 Under Title IX of the VAT Directive certain activities are exempt from VAT. The supply of consulting services, including legal, commercial and financial advice, does not fall within those exemptions. Therefore, consulting services, such as those at issue in the main proceedings, fall within the scope of the VAT Directive.

35 In that regard, it must be recalled that, according to the Court’s case-law, the basis of assessment for a supply of services is everything which makes up the consideration for the service and that a supply of services is therefore taxable only if there is a direct link between the service supplied and the consideration received. Consequently, a service is taxable only if a legal relationship exists between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see, to that effect, judgments in *Tolsma*, C?16/93, EU:C:1994:80, paragraphs 13 and 14, and *Kennemer Golf*, C?174/00, EU:C:2002:200, paragraph 39).

36 It must therefore be determined whether the fixed payment made under a subscription contract for the supply of consulting services, such as that at issue in the main proceedings, constitutes the consideration for the supply of services agreed, including the commitment to be permanently available to the customer and also to refrain from entering into contracts with its competitors, and whether there is a direct link between the services supplied and the consideration received.

37 In that regard, the Court, in the framework of the cases that gave rise to the judgments in *Kennemer Golf* (C?174/00, EU:C:2002:200) and *Le Rayon d’Or* (C?151/13, EU:C:2014:185) respectively, has already examined the application of VAT (i) to a fixed annual fee paid to a sports association for the use of sports facilities including a golf course and (ii) to a lump-sum payment for care services for dependent persons.

38 At paragraph 40 of the judgment of *Kennemer Golf* (C?174/00, EU:C:2002:200) and paragraph 36 of the judgment of *Le Rayon d’Or* (C?151/13, EU:C:2014:185), the Court held, in essence, that where the supply of services in question is characterised, inter alia, by the permanent availability of the service provider in order to supply, at the appropriate time, the

services required by the customer, it is not necessary, in order to find that there is a direct link between that service and the consideration received, to establish that a payment relates to a personalised supply of services at a specific time carried out at the request of a customer. In each of the cases which gave rise to those judgments, there was a supply of taxable services, to which the fixed sum related, irrespective of the number of services provided and received in each case, namely the number of rounds of golf played or the amount of care provided.

39 The fact that the services provided are neither defined in advance nor personalised and that the payment is made in the form of a lump sum is also not such as to affect the direct link between the supply of services made and the consideration received, the amount of which is determined in advance on the basis of well-established criteria (judgment in *Le Rayon d'Or*, C-715/13, EU:C:2014:185, paragraph 37).

40 Those considerations are applicable to a subscription contract for consulting services, such as the contract at issue in the main proceedings — the legitimacy of which it is however for the national court to check —, in which the customer has undertaken to pay the remuneration agreed between the parties by way of fixed sums, irrespective of the quantity and nature of consulting services actually supplied during the period to which that remuneration relates.

41 The fact that the customer pays not by way of a single fixed sum but by way of several periodic payments cannot affect this finding, since the difference relating to those payments does not concern the taxable nature of the activity but only the arrangements for payment of the fixed sum.

42 As regards the commitment of the provider to refrain from supplying services to a competitor of the customer, this is akin to an exclusivity clause, which is part of the subscription contract for consulting services and cannot be such as to change the taxable nature of that contract. There is therefore no need in answering the first question to consider Article 25(b) of the VAT Directive, concerning an 'obligation to refrain from an act'.

43 Having regard to the foregoing considerations, the answer to the first question is that Article 24(1) of the VAT Directive must be interpreted as meaning that the term 'supply of services' includes subscription contracts for the supply of consulting services to an undertaking, in particular those of a legal, commercial or financial nature, under which a supplier has agreed to be available to the customer during the term of the contract.

The second and third questions

44 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether, as regards subscription contracts for consulting services, such as those at issue in the main proceedings, Articles 62(2), 63 and 64(1) of the VAT Directive must be interpreted as meaning that the chargeable event and the chargeability of the tax occur upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer makes use of the supplier's services.

45 The answer to this question follows in part from the answer given to the first question.

46 The 'chargeable event' is defined in Article 62(1) of the VAT Directive as the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled. In accordance with Article 63 of the VAT Directive, this event occurs and VAT becomes chargeable when the services are supplied.

47 As has been explained at paragraphs 40 and 41 above, in the case in the main proceedings,

since the object of the supply of services is not to provide specific advice but to be available to the customer in order to advise it, the service provider makes the supply of services by the very fact of being available during the period set in the subscription contract, irrespective of the quantity and nature of the consulting services actually provided during the period to which that remuneration relates.

48 According to Article 64(1) of the VAT Directive, where it gives rise to successive payments, the supply of services is to be regarded as being completed upon expiry of the periods to which those payments relate.

49 Thus, a service such as that at issue in the main proceedings, which in essence entails being permanently available to the customer in order to provide it with consulting services and which is remunerated by means of fixed sums paid periodically, must be regarded as being supplied in the period to which the payment relates, whether or not the service provider has actually provided advice to its customer during that period.

50 It is at the end of each period to which the payments relate that the supply must be regarded as having been completed for the purposes of Article 64(1) of the VAT Directive. Since the chargeable event and the chargeability of the tax depend on the moment when the service is supplied, in accordance with Article 63 of that directive, it follows that it is also at the end of each of those periods that that event and that chargeability occur.

51 Accordingly, the answer to the second and third questions is that, as regards subscription contracts for consulting services, such as those at issue in the main proceedings, Articles 62(2), 63 and 64(1) of the VAT Directive must be interpreted as meaning that the chargeable event and the chargeability of the tax occur upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer has actually made use of the supplier's services.

Costs

52 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 (Third Chamber) hereby rules:

1. Article 24(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as meaning that the term 'supply of services' includes subscription contracts for the supply of consulting services to an undertaking, in particular those of a legal, commercial or financial nature, under which a supplier has agreed to be available to the customer during the term of the contract.

2. As regards subscription contracts for consulting services, such as those at issue in the main proceedings, Articles 62(2), 63 and 64(1) of Directive 2006/112 must be interpreted as meaning that the chargeable event and the chargeability of the tax occur upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer has actually made use of the supplier's services.

[Signatures]

* Language of the case: Bulgarian.