62017CJ0016
JUDGMENT OF THE COURT (Fifth Chamber)

7 August 2018 (*1)

(Reference for a preliminary ruling — Value added tax (VAT) — Deduction of input tax — Origin and scope of the right to deduct)

In Case C?16/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal), made by decision of 29 June 2016, received at the Court on 13 January 2017, in the proceedings

TGE Gas Engineering GmbH — Sucursal em Portugal

v

Autoridade Tributária e Aduaneira,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet (Rapporteur), M. Berger and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 March 2018,

after considering the observations submitted on behalf of:

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TGE Gas Engineering GmbH — Sucursal em Portugal, by A. Fernandes de Oliveira, advogado,

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the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and R. Campos Laires, acting as Agents,

–

the European Commission, by L. Lozano Palacios and B. Rechena, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2018,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Articles 44, 45, Article 132(1)(f), Articles 167 to 169, 178, 179, 192a to 194 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), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1), ('the VAT Directive'), of Articles 10 and 11 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1), and of the principle of neutrality.

2

The request has been made in the context of proceedings between TGE Gas Engineering GmbH — Sucursal em Portugal ('TGE Sucursal em Portugal') and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) ('the ATA'), concerning that authority's refusal to grant TGE Sucursal em Portugal a value added tax (VAT) deduction resulting from the re-invoicing of costs from an Economic Interest Group (EIG).

Legal context

EU law

The VAT Directive

3

Article 44 of the VAT Directive provides:

'The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.'

4

Article 45 of that directive provides:

'The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.'

5

Article 132(1)(f) of that directive is worded as follows:

‘Member States shall exempt the following transactions:

…

(f)

the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition.’

6

Article 167 of the VAT Directive states:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

7

Article 168(a) of that directive provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a)

the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.’

8

Pursuant to Article 169(a) of the VAT Directive:

‘In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a)

transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State.’

9

Article 178(a) and (f) of the VAT Directive provides as follows:

‘In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a)

for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or

services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI;

…

(f)

when required to pay VAT as a customer where Articles 194 to 197 or Article 199 apply, he must comply with the formalities as laid down by each Member State.’

10

Article 179 of that directive provides:

‘The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.

However, Member States may require that taxable persons who carry out occasional transactions, as defined in Article 12, exercise their right of deduction only at the time of supply.’

11

According to Article 192a of that directive:

‘For the purposes of this Section, a taxable person who has a fixed establishment within the territory of the Member State where the tax is due shall be regarded as a taxable person who is not established within that Member State when the following conditions are met:

(a)

he makes a taxable supply of goods or of services within the territory of that Member State;

(b)

an establishment which the supplier has within the territory of that Member State does not intervene in that supply.’

12

Article 193 of the VAT Directive states:

‘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.’

13

Article 194 of that directive provides:

‘1. Where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due, Member States may provide that the person liable for payment of VAT is the person to whom the goods or services are supplied.

2. Member States shall lay down the conditions for implementation of paragraph 1.’

14

Article 196 of that directive reads as follows:

‘VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.’

Implementing Regulation No 282/2011

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Pursuant to Article 10 of Implementing Regulation No 282/2011:

‘1. For the application of Articles 44 and 45 of [the VAT] Directive, the place where the business of a taxable person is established shall be the place where the functions of the business’s central administration are carried out.

2. In order to determine the place referred to in paragraph 1, account shall be taken of the place where essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located and the place where management meets.

Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take precedence.

3. The mere presence of a postal address may not be taken to be the place of establishment of a business of a taxable person.’

16

Article 11 of the Implementing Regulation provides:

‘1. For the application of Article 44 of [the VAT] Directive, a “fixed establishment” shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

2. For the application of the following Articles, a “fixed establishment” shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies:

(a)

Article 45 of [the VAT] Directive;

(b)

from 1 January 2013, the second subparagraph of Article 56(2) of [the VAT] Directive;

(c)

until 31 December 2014, Article 58 of [the VAT] Directive;

(d)

Article 192a of [the VAT] Directive.

3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.'

Portuguese law

17

The Regime do Registo Nacional de Pessoas Coletivas (Law on the national register of legal entities), approved by Decree-Law No 129/98 of 13 May 1998 (Diário da República I, Series I-A, No 110, of 13 May 1998), regulates the registration of legal entities in the national register of legal entities.

18

In accordance with Article 4(1)(a) and (b) of the Law on the national register of legal entities, that register contains registrations both of legal entities governed by Portuguese law or the law of another State and of representations of legal entities governed by international law or the law of another State which habitually operate in Portugal.

19

Article 13 of the Law on the national register of legal entities provides that each legal entity recorded in that register is to receive a tax identification number and that article regulates the detailed rules governing the allocation of that number.

20

In accordance with Article 6(2) of the Corporation Tax Code, an EIG must pass on to its constituent parties, in the proportions agreed in the articles of association, the profits made or losses incurred during an accounting year. Those profits or losses are taken into account in the taxable income of the members of the EIG with regard to income tax.

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

21

TGE Gas Engineering GmbH, established in Bonn ('TGE Bonn'), a company incorporated under German law, obtained in Portugal, on 3 March 2009, tax identification number 980410878 corresponding to a non-resident entity without a fixed establishment for the purpose of carrying out an isolated act, namely the acquisition of shares.

22

On 7 April 2009, TGE Sucursal em Portugal was registered in Portugal as a non-resident entity

with a fixed establishment in the form of a branch and was allocated tax identification number 980412463.

23

TGE Bonn went on to form an EIG with Somague Engenharia SA known as ‘Projesines Expansão do Terminal de GNL de Sines, ACE’ (‘the EIG Projesines’). For the purpose of the formation of the EIG Projesines, TGE Bonn used its tax identification number and not that of TGE Sucursal em Portugal. The EIG Projesines received its own tax identification number, namely 508917280.

24

The objective of the EIG Projesines was to implement the planned extension of the liquefied natural gas terminal at Sines in Portugal. That terminal belongs to Redes Energéticas Nacionais SA, a Portuguese electricity company.

25

EIGs are subject to special arrangements in Portugal. In accordance with Article 6(2) of the Corporation Tax Code, an EIG is required to pass on to its constituent parties, in the proportions agreed in the articles of association, the profits made or losses incurred during an accounting year. Those profits or losses are taken into account in the taxable income of the members of the EIG with regard to income tax.

26

The articles of association of the EIG Projesines determine Somague Engenharia’s contribution at 85% and that of TGE Bonn at 15%. In addition, the EIG Projesines’s internal agreement and rules attribute 64.29% of the obligations and liabilities to TGE Bonn, with the remaining 35.71% being attributed to Somague Engenharia.

27

On 4 May 2009, TGE Sucursal em Portugal concluded a subcontract with the EIG Projesines. The subcontract provides for reciprocal performance between TGE Sucursal em Portugal and the EIG Projesines, with the latter being obliged to invoice its costs to TGE Sucursal em Portugal.

28

The EIG Projesines transferred all of the invoices resulting from the subcontract with TGE Sucursal em Portugal and all of the invoices from Somague Engenharia to Redes Energéticas Nacionais as developer, respecting the full back-to-back general principle in the subcontract with TGE Sucursal em Portugal.

29

For the purposes of the attribution and re-invoicing of its costs, the EIG Projesines used the tax identification number of TGE Sucursal em Portugal and not that of TGE Bonn. The EIG Projesines therefore referred, in the debit notes which it sent to TGE Sucursal em Portugal, to the tax identification number of TGE Sucursal em Portugal and charged VAT on that basis. The EIG Projesines attributed 64.29% of its costs to TGE Sucursal em Portugal.

30

TGE Sucursal em Portugal then deducted the VAT paid on the debit notes issued by the EIG Projesines.

31

During a tax audit of TGE Sucursal em Portugal covering the accounting years 2009 to 2011, the ATA drew up a report stating that TGE Sucursal em Portugal and TGE Bonn are two different entities, each of which has a different tax identification number. According to the ATA, as TGE Sucursal em Portugal was not a constituent member of the EIG Projesines, it could not attribute its costs to it and consequently TGE Sucursal em Portugal could not deduct the VAT relating to those costs.

32

The ATA therefore requested TGE Sucursal em Portugal to reimburse the amounts corresponding to the improperly deducted VAT. TGE Sucursal em Portugal brought an action before the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) in order to obtain the annulment of the decision by which the ATA requested that reimbursement.

33

Before the referring court, the ATA submits that TGE Sucursal em Portugal was a fixed establishment with a different legal personality and tax capacity to those of TGE Bonn. Since TGE Bonn alone was part of the EIG Projesines, TGE Sucursal em Portugal, in its view, was not entitled to assume the costs of the EIG Projesines and to deduct the VAT relating to those costs. The fact that the EIG Projesines’s invoices apply the apportionment rates provided for in that company’s articles of association is irrelevant in that regard.

34

According to the ATA, each of the two entities had its own personality for tax purposes and, therefore, they were two separate entities for VAT purposes. If TGE Bonn had wished to attribute the results of the EIG Projesines to TGE Sucursal em Portugal as a non-resident entity with a fixed establishment, it could and should have used the tax identification number of TGE Sucursal em Portugal at the time of the formation of the EIG Projesines.

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Furthermore, the ATA considers that there was no immediate and direct link between the debit notes charged to TGE Sucursal em Portugal and its transactions. There is, therefore, in its view, no right to deduct VAT.

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In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration)) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Articles 44, 45, 132(1)(f), 167 [to] 169, 178, 179, [192a to 194] and 196 of [the VAT] Directive …, Articles 10 and 11 of Implementing Regulation No 282/2011 and the principle of neutrality be interpreted as precluding the Portuguese tax authorities from refusing the right to deduction of VAT by a branch of a German company, in circumstances where:

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the German company obtained a tax identification number in Portugal to carry out an isolated act, namely “acquisition of shares”, corresponding to a non-resident entity without a fixed establishment;

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subsequently, the branch of that German company was registered in Portugal and was assigned its own tax identification number, as a fixed establishment of that company;

–

later, the German company, using the first identification number, entered into a contract with another company to establish an [EIG] to carry out a works contract in Portugal;

–

subsequently, the branch, using its own tax identification number, entered into a subcontract with the EIG setting out the reciprocal services between the branch and the EIG and agreeing that the latter would invoice the subcontractors, in the agreed proportions, for the costs which it incurred;

–

the EIG indicated the branch’s tax identification number in the debit notes which it issued to invoice costs to that branch, and charged VAT;

–

the branch deducted the VAT charged in the debit notes;

–

the transactions of the EIG consist (by way of subcontracting) of the transactions of the branch and of the other company forming part of the EIG, those entities having invoiced to the EIG the entire revenue that the EIG invoiced to the developer?’

Consideration of the question referred

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By its question, the referring court asks, in essence, whether, inter alia, Articles 167 and 168 of the VAT Directive and the principle of neutrality must be interpreted as precluding the tax authority of a Member State from regarding a company which has its headquarters in another Member State and the branch that it holds in the first of those States as constituting two separate taxable entities on the ground that each of those entities has a tax identification number, and from refusing, for that reason, the branch the right to deduct the VAT charged on the debit notes issued by an EIG of which that company, and not its branch, is a member.

38

It is apparent from the file submitted to the Court that the dispute in the main proceedings has its origin essentially in the conclusions drawn by the competent tax authority from the fact that TGE Bonn and TGE Sucursal em Portugal have different tax identification numbers and from the fact that, at the time of the formation of the EIG Projesines, the tax identification number of TGE Bonn was used, whereas, for the issuing of invoices relating to the allocation of costs concerning that group, the latter used the tax identification number of TGE Sucursal em Portugal.

39

In that regard, it should be recalled, on the one hand, that, according to Article 168(a) of the VAT Directive, in so far as goods or services are used for the purposes of taxable transactions, the taxable person is to be entitled to deduct, from the amount which he is liable to pay, the VAT due or paid on those goods or services if they are delivered or supplied by another taxable person. The recipient of the services in question must therefore be a taxable person within the meaning of that directive.

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Article 9 of the VAT Directive defines ‘taxable person’ as being 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, should be given an autonomous and uniform interpretation (judgment of 17 September 2014, Skandia America (USA), filial Sverige, C?7/13, EU:C:2014:2225, paragraph 23).

41

With regard to a company established in one Member State and its branch located in another Member State, it is apparent from the case-law of the Court that those two entities constitute a single taxable person subject to VAT (see, to that effect, judgments of 23 March 2006, FCE Bank, C?210/04, EU:C:2006:196, paragraph 37; of 16 July 2009, Commission v Italy, C?244/08, not published, EU:C:2009:478, paragraph 38; and of 12 September 2013, Le Crédit Lyonnais, C?388/11, EU:C:2013:541, paragraph 34), unless it is established that the branch carries out an independent economic activity. It is necessary in that regard to determine whether that branch may be considered to be independent, in particular in that it bears the economic risk arising from its business (judgment of 23 March 2006, FCE Bank, C?210/04, EU:C:2006:196, paragraph 35).

42

In the case in the main proceedings, TGE Bonn obtained an initial tax identification number in Portugal for the purposes of an isolated act consisting in the formation of the EIG Projesines. TGE Bonn subsequently obtained a second tax identification number for the registration of TGE Sucursal em Portugal, which was used in all of the activities carried out, by TGE Bonn and by that branch, in Portugal. It is clear that the two tax identification numbers of TGE Bonn and of TGE Sucursal em Portugal are attributable to one single entity, namely TGE Bonn.

43

It follows that TGE Bonn and TGE Sucursal em Portugal constitute a single taxable person within the meaning of the VAT Directive.

44

It should be recalled, on the other hand, that, according to settled case-law, the right to deduct laid down in Articles 167 and 168 of the VAT Directive is an integral part of the VAT mechanism and in principle may not be limited (see, inter alia, judgments of 8 May 2008, Ecotrade, C?95/07 and C?96/07, EU:C:2008:267, paragraph 39 and the case-law cited; of 12 July 2012, EMS-Bulgaria Transport, C?284/11, EU:C:2012:458, paragraph 44; and of 28 July 2016, Astone, C?332/15, EU:C:2016:614, paragraph 30).

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In the present case, as TGE Bonn and TGE Sucursal em Portugal must be regarded as constituting a single legal entity and, therefore, a single taxable person, the principle of fiscal neutrality requires the deduction of input VAT to be allowed if the substantive requirements governing that deduction are satisfied (see, by analogy, judgment of 27 September 2007, Collée, C?146/05, EU:C:2007:549, paragraph 31).

46

Consequently, where the tax authority has the information necessary to establish that the taxable person, as the recipient of the supplies in question, is liable to VAT, it cannot, in relation to the right of that taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes (judgments of 1 April 2004, Bockemühl, C?90/02, EU:C:2004:206, paragraph 51, and of 8 May 2008, Ecotrade, C?95/07 and C?96/07, EU:C:2008:267, paragraph 64).

47

It follows that, in a situation such as that at issue in the main proceedings, the tax authority of a Member State cannot refuse the deduction of input VAT to a taxable person on the sole ground that that taxable person used a tax identification number as a non-resident entity without a fixed establishment at the time of the formation of an EIG and used the tax identification number of its branch located in that State for the re-invoicing of the costs of that group.

48

That conclusion is not called into question by the fact that TGE Bonn is established in Germany and that TGE Sucursal em Portugal is its fixed establishment in Portugal.

49

In that regard, it should be recalled that, in accordance with the first sentence of Article 44 of the VAT Directive, the place of supply of services to a taxable person acting as such is the place where that person has established his business. The EU legislature used that point of reference principally because, as an objective criterion that is simple and practical, it offers great legal certainty (judgment of 16 October 2014, Welmory, C?605/12, EU:C:2014:2298, paragraphs 53 to 55). By contrast, the connection to the taxable person’s fixed establishment, referred to in the second sentence of Article 44 of the VAT Directive, is a secondary point of reference which is an exception to the general rule (judgment of 16 October 2014, Welmory, C?605/12, EU:C:2014:2298, paragraph 56).

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It is thus for the referring court to assess, in the context of the dispute in the main proceedings, whether the other conditions giving rise to the right to deduct input tax, as set out in Article 168(a) of the VAT Directive, are satisfied.

51

In the light of the foregoing, the answer to the question referred is that Articles 167 and 168 of the VAT Directive and the principle of neutrality must be interpreted as precluding the tax authority of a Member State from regarding a company which has its headquarters in another Member State and the branch which it has in the first of those States as constituting two separate taxable entities on the ground that each of those entities has a tax identification number, and, for that reason, from refusing that branch the right to deduct the VAT on the debit notes issued by an EIG of which that company, and not its branch, is a member.

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 (Fifth Chamber) hereby rules:

Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, and the principle of neutrality must be interpreted as precluding the tax authority of a Member State from regarding a company which has its headquarters in another Member State and the branch which it has in the first of those States as constituting two separate taxable entities on the ground that each of those entities has a tax identification number, and, for that reason, from refusing that branch the right to deduct value added tax (VAT) on the debit notes issued by an economic interest group of which that company, and not its branch, is a member.

[Signatures]

(*1) Language of the case: Portuguese.