

JUDGMENT OF THE COURT (Fourth Chamber)

25 April 2013 (*)

(Failure of a Member State to fulfil obligations – Taxation – Directive 2006/112/EC – Articles 9 and 11 – National legislation permitting the inclusion of non-taxable persons in a group of persons who may be regarded as a single taxable person for VAT purposes)

In Case C-86/11,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 24 February 2011,

European Commission, represented by R. Lyal, acting as Agent, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by S. Hathaway, acting as Agent, and M. Hall QC,

defendant,

supported by:

Czech Republic, represented by M. Smolek and T. Müller, acting as Agents,

Kingdom of Denmark, represented initially by C. Vang, and subsequently by V. Pasternak Jørgensen, acting as Agents, with an address for service in Luxembourg,

Ireland, represented by D. O'Hagan, acting as Agent, assisted by G. Clohessy, SC, and N. Travers, BL, with an address for service in Luxembourg,

Republic of Finland, represented by H. Leppo and S. Hartikainen, acting as Agents,

interveners,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting as President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2012,

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

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that, by permitting non-taxable persons to be members of a group of persons regarded as a single taxable person for purposes of value added tax (a 'VAT group' and 'VAT' respectively), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 9 and 11 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').

Legal context

European Union law

2 Articles 9 to 13 of the VAT Directive are included in Title III (entitled 'Taxable persons') of that directive.

3 Article 9 of that directive provides:

'1. "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.

2. In addition to the persons referred to in paragraph 1, any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the Community, shall be regarded as a taxable person.'

4 Article 10 of the VAT Directive states that the condition that the economic activity be conducted independently is to exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

5 Article 11 of the VAT Directive provides:

'After consulting the advisory committee on [VAT], 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 Article 12 of the VAT Directive provides that Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) of that directive, and in particular the supply of a building or of building land.

7 Under Article 13 of the VAT Directive, regional and local government authorities and other bodies governed by public law are not, as a general rule, to be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities.

Law of the United Kingdom

8 Subsection (1) of section 43 of the Value Added Tax Act 1994, in the version applicable to the present case, entitled 'Groups of companies', provides:

'Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member ...'.

9 Section 43A of that Act, entitled 'Groups: eligibility', is worded as follows:

'(1) Two or more bodies corporate are eligible to be treated as members of a group if each is established or has a fixed establishment in the United Kingdom and –

- (a) one of them controls each of the others,
- (b) one person (whether a body corporate or an individual) controls all of them, or
- (c) two or more individuals carrying on a business in partnership control all of them.

(2) For the purposes of this section a body corporate shall be taken to control another body corporate if it is empowered by statute to control that body's activities or if it is that body's holding company within the meaning of section 736 of the Companies Act 1985 [1985 c. 6].

(3) For the purposes of this section an individual or individuals shall be taken to control a body corporate if he or they, were he or they a company, would be that body's holding company within the meaning of that section.'

The pre-litigation procedure and the proceedings before the Court

10 On 23 September 2008, the Commission sent a letter of formal notice to the United Kingdom drawing the attention of that Member State to the possible incompatibility with Articles 9 and 11 of the VAT Directive of its national legislation permitting the inclusion of non-taxable persons in a VAT group. In accordance with Article 226 EC, the Commission invited the United Kingdom to submit its observations.

11 In their letter in reply of 18 November 2008, the United Kingdom authorities disputed the Commission's interpretation of the VAT Directive.

12 As the Commission was not satisfied with that reply, on 20 November 2009 it issued a reasoned opinion, to which the United Kingdom replied by letter of 18 January 2010 maintaining its position.

13 In those circumstances the Commission decided to bring the present action.

14 By order of the President of the Court of 8 July 2011, the Czech Republic, the Kingdom of Denmark, Ireland and the Republic of Finland were granted leave to intervene in support of the form of order sought by the United Kingdom.

The action

Arguments of the parties

15 In support of its action, the Commission submits that Article 11 of the VAT Directive must be interpreted as meaning that non-taxable persons for VAT purposes cannot be included in a VAT group.

16 It submits that the word 'persons' in Article 11 of the VAT Directive refers only to persons who satisfy the necessary conditions to be regarded as taxable persons. It points out, in that regard, that Article 11 of the VAT Directive is included in Title III of that directive (entitled 'Taxable persons') and that it does not contain a derogation from Article 9 thereof, which defines a 'taxable person' as 'any person who, independently, carries out ... any economic activity'.

17 Article 11 of the VAT Directive, the Commission contends, constitutes an exception to the general rule that each taxable person is to be treated as a separate entity for the application of the VAT rules. That provision must therefore be interpreted in such a way as not to diverge any more than necessary from the general rule. Although that provision does not expressly provide that the members of a VAT group must be taxable persons, the fact that the persons included in such a group are to be treated as 'a single' taxable person nevertheless implies that each member of that group must itself be a taxable person. Likewise, the concept of 'grouping' implies that the persons concerned belong to the same category for the purposes of the common system of VAT. The word 'persons' was therefore used only in order to avoid repetition of the term 'taxable person'.

18 Furthermore, according to the Commission, if the word 'persons' were to be understood as referring to all persons without restriction, then a VAT group could be composed solely of non-taxable persons, something which would be contrary to the VAT Directive.

19 The Commission submits that its interpretation of Article 11 of the VAT Directive is, moreover, consistent with the objective of that article, which is, as is apparent from the Explanatory Memorandum to the Commission proposal [COM(73) 950 final] which led to the adoption of 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: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive'), to simplify administration for the taxpayer and the tax authorities and to combat abuse by preventing persons which are not truly independent business units from being treated as separate taxable persons. The inclusion of non-taxable persons in a VAT group would, the Commission argues, neither simplify administration nor prevent abuse.

20 Neither the wording of Article 11 of the VAT Directive nor the preparatory documents relating to that directive state that that provision was intended to alter the concept of a 'taxable person' or to extend the rights and obligations of taxable persons to others. That would, however, be the result, according to the Commission, if non-taxable persons were able to join a VAT group. In particular, as acquisitions that take place within a VAT group are regarded as non-existent for VAT purposes, that would permit the supply of goods and the provision of services to non-taxable persons without any charge to VAT, and would allow the group in question to recover input VAT in respect of supplies made to such persons, which would clearly be contrary to the common system of VAT.

21 It is therefore necessary, according to the Commission, not to adhere to a literal interpretation of Article 11 of the VAT Directive, but to read it in the light of its immediate context, namely Title III of the VAT Directive, and, more generally, in the light of the scheme of that directive.

22 Contrary to what the United Kingdom maintains, the principles of fiscal neutrality and of equal treatment require the exclusion of non-taxable persons from VAT groups because the question as to whether or not an entity engages in economic activities is fundamental to the common system of VAT and is not arbitrary.

23 Although the Court has not hitherto had occasion to rule on the issue raised by the present case, indirect support for the Commission's position is, in the latter's view, to be found in paragraph 19 of the judgment in Case C-162/07 *Ampliscientifica and Amplifin* [2008] ECR I-4019, and in the Opinion of Advocate General Van Gerven in the case which gave rise to the judgment in Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111.

24 The United Kingdom contends that the action should be dismissed. It states, first of all, that the provisions of its national legislation were enacted pursuant to Article 4(4) of the Sixth Directive, now Article 11 of the VAT Directive, and do not make the inclusion of an entity in a VAT group dependent on its status as a taxable person within the meaning of Article 9 of the VAT directive.

25 Since the Commission accepts that exempt or partially exempt traders may join fully taxable traders in a VAT group, it must also, according to that Member State, accept that Article 11 of the VAT Directive contemplates the situation to which it objects, namely taxable persons extending their rights and obligations to non-taxable persons. It submits, in that regard, that that article permits Member States merely to regard persons closely bound to one another by financial, economic and organisational links as a single taxable person.

26 So far as concerns the literal interpretation of Article 11 of the VAT Directive, the United Kingdom takes the view that the words 'any persons' used in the English-language version of Article 11 of the VAT Directive strongly imply that the reference is to persons in general, whether they are taxable or non-taxable. Furthermore, if it had been the legislature's intention to exclude non-taxable persons from VAT groups then different wording would have been used. Moreover, the distinction made between 'persons' and 'taxable persons' is not unique to the English-language version of that article, but appears in other language versions thereof.

27 The concept of grouping does not, in the view of the United Kingdom, necessarily mean that all the members of the group are engaged in activities falling within the scope of the VAT Directive. The member of a VAT group must simply be closely bound to one another by financial, economic and organisational links. Little weight should be attached to the adjective 'single', which simply means that those who have grouped together are treated as a single entity for VAT purposes. The Commission's concern that a VAT group could be composed solely of non-taxable persons is

unfounded. There are no such groups in the United Kingdom and they would be devoid of any meaningful purpose.

28 As regards the objective of Article 11 of the VAT Directive, the United Kingdom maintains that the objectives of simplifying administration and combating abuse can be met by allowing non-taxable persons to join a VAT group. In particular, the inclusion within such a group of companies such as dormant companies or holding companies, which have the potential to engage in economic activities and may support activities elsewhere in the group, meets the objective of simplifying administration. The Commission's approach ignores the Court's case-law, which recognises that entities which merely have the potential to engage in economic activities, or which do so only intermittently, may nevertheless fall within the scope of VAT.

29 Lastly, the United Kingdom submits that the Commission's position is not supported by the case-law to which it refers and takes the view that it would be contrary to the principles of fiscal neutrality and of equal treatment to permit some corporate groups to form a VAT group but not others, simply because they have different corporate structures. That, it is argued, would encourage the artificial creation of minimal amounts of economic activity to justify the inclusion of non-taxable persons within a VAT group.

30 Like the United Kingdom, the Czech Republic, the Kingdom of Denmark, Ireland and the Republic of Finland submit that the Commission's position is not supported by the wording and objectives of Article 11 of the VAT Directive, the common system of VAT or the Court's case-law.

Findings of the Court

31 It should be borne in mind at the outset that, in determining the scope of a provision of European Union law, its wording, context and objectives must all be taken into account (Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 23 and the case-law cited).

32 In the present case, it is apparent from the wording of the first paragraph of Article 11 of the VAT Directive that that directive permits each Member State to regard a number of persons as a single taxable person if those persons are established in the territory of that Member State and if, although they are legally independent, they are closely bound to one another by financial, economic and organisational links. The application of that article is not, according to its wording, made subject to other conditions, in particular to the condition that those persons could themselves, individually, have had the status of a taxable person within the meaning of Article 9(1) of the VAT Directive. As it uses the word 'persons' and not the words 'taxable persons', the first paragraph of Article 11 of the VAT Directive does not make a distinction between taxable persons and non-taxable persons (judgment of 9 April 2013 in Case C-85/11 *Commission v Ireland* [2013] ECR I-0000, paragraph 36).

33 It must be pointed out that Article 11 of the VAT Directive derives from the second subparagraph of Article 4(4) of the Sixth Directive. Whereas point 2 of Annex A to Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16), which introduced the concept of a VAT group into European Union law, permitted Member States 'not to consider as separate taxable persons, but as one single taxable person', persons who are organically linked to one another by economic, financial or organisational relationships, the words 'as separate taxable persons' were abandoned in the drafting of the second subparagraph of Article 4(4) of the Sixth Directive (*Commission v Ireland*, paragraph 37).

34 Furthermore, although the wording of the second subparagraph of Article 4(4) of the Sixth Directive was repeated in similar terms in the majority of the language versions of Article 11 of the VAT Directive, in the English-language version of that article the word 'any' was added, with the result that the relevant passage of that provision reads as follows: 'each Member State may regard as a single taxable person any persons established in the territory of that Member State' (*Commission v Ireland*, paragraph 38).

35 It is not apparent from those successive drafting amendments that the European Union legislature intended, when adopting the Sixth Directive and, subsequently, the VAT Directive, to preclude non-taxable persons from being capable of inclusion in a VAT group and that the word 'persons' was used instead of the words 'taxable persons' in order to avoid repetition. The fact that other provisions of the VAT Directive, which do not come under Title III thereof dealing with the concept of a 'taxable person', use the term 'persons' to designate taxable persons cannot result in any different finding, as that term is used in a different context to that of Article 11 of the VAT Directive (*Commission v Ireland*, paragraph 39).

36 Furthermore, it must be pointed out that, contrary to what the Commission argues, it cannot be inferred from the words 'as a single taxable person' that Article 11 of the VAT Directive seeks solely to permit a number of taxable persons to be dealt with as a single entity, as those words relate, not to a condition for the application of that article, but to its outcome, which is that a number of persons are regarded as a single taxable person. In addition, there is no basis in the wording of that article for the Commission's argument that it represents an exception to the general rule that each taxable person must be treated as a separate entity, with the result that that article is to be interpreted restrictively, or for the argument that the concept of grouping implies that all of the persons concerned belong to the same category, as the word 'grouping' does not appear in that article (*Commission v Ireland*, paragraph 40).

37 Consequently, it is not apparent from the wording of Article 11 of the VAT Directive that non-taxable persons cannot be included in a VAT group (*Commission v Ireland*, paragraph 41).

38 The Commission, however, submits that, going beyond the wording of Article 11 of the VAT Directive, its interpretation of that article must prevail in view of its context, its objectives and the case-law of the Court. It is for that reason necessary to examine whether the arguments put forward by the Commission in support of that stance demonstrate that Article 11 of the VAT Directive must be interpreted as meaning that non-taxable persons cannot be included in a VAT group.

39 It must be pointed out, firstly, that the case-law of the Court to which the Commission refers as regards that issue cannot usefully be relied on in the present case since that issue is not the subject-matter of the abovementioned judgments in *Polysar Investments Netherlands* and *Ampliscentifica and Amplifin* (*Commission v Ireland*, paragraph 43).

40 As regards, secondly, the context of Article 11 of the VAT Directive, it is necessary to point out that Article 9(1) of that directive contains a general definition of the concept of a 'taxable person'. Article 9(2) and Articles 10, 12 and 13 of that directive provide details in respect of that concept, either by including in it, or by permitting Member States to include in it, persons who do not satisfy that general definition, such as persons who carry out certain transactions on an occasional basis, or by excluding other persons from it, such as employed persons or public authorities. Consequently, it cannot be inferred from the scheme of Title III of the VAT Directive that a person who does not satisfy that general definition is necessarily excluded from being one of the persons referred to in Article 11 thereof (*Commission v Ireland*, paragraph 44).

41 As regards the relationship, within Title III of the VAT Directive, between Articles 9(1) and 11 of that directive, it must be stated that a combined reading of those articles does not support the conclusion, drawn by the Commission, that the persons referred to in Article 11 must individually satisfy the general definition of a taxable person set out in Article 9(1) of that directive. A comparison of those two provisions does not preclude the interpretation that, as submitted by the United Kingdom and the interveners, it is those persons, taken together and closely bound to one another by financial, economic and organisational links, who must collectively satisfy that definition (*Commission v Ireland*, paragraph 45).

42 Consequently, it is not possible to uphold the Commission's arguments that, having regard to the context of Article 11 of the VAT Directive, that article must be interpreted as meaning that non-taxable persons cannot be included in a VAT group (*Commission v Ireland*, paragraph 46).

43 As regards, thirdly, the objectives pursued by Article 11 of the VAT Directive, it is apparent from the Commission's Explanatory Memorandum to the proposal which resulted in the adoption of the Sixth Directive that, by adopting the second subparagraph of Article 4(4) of the Sixth Directive, which was replaced by Article 11 of the VAT Directive, the European Union legislature intended, in the interests of simplifying administration or with a view to combating abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that Member States would not be obliged to treat as taxable persons those whose 'independence' is purely a legal technicality (*Commission v Ireland*, paragraph 47).

44 It is not evident that the possibility for Member States to regard as a single taxable person a group of persons including one or more persons who may not individually have the status of a taxable person runs counter to those objectives. It is, on the contrary, conceivable that, as the United Kingdom and the interveners have submitted, the presence, within a VAT group, of such persons contributes to administrative simplification both for the group and for the tax authorities and makes it possible to avoid certain abuses, and that that presence may even be indispensable to those ends if it alone establishes the close financial, economic and organisational links which must exist between the persons constituting that group in order for it to be regarded as a single taxable person (*Commission v Ireland*, paragraph 48).

45 In addition, it must be pointed out that, if such a possibility might itself give rise to abuse, the second paragraph of Article 11 of the VAT Directive permits Member States to adopt any measures needed to prevent tax evasion or avoidance through the use of the first paragraph of Article 11 (*Commission v Ireland*, paragraph 49).

46 Consequently, the Commission has not established that the objectives of Article 11 of the VAT Directive militate in favour of an interpretation according to which non-taxable persons cannot be included in a tax group.

47 In view of all of the foregoing considerations, the Commission's action must be dismissed.

Costs

48 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. In accordance with Article 140(1) of those Rules of Procedure, under which Member States which have intervened in the proceedings are to bear their own costs, it must be held that the Czech Republic, the Kingdom of

Denmark, Ireland and the Republic of Finland are to bear their own respective costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Dismisses the action;**
2. **Orders the European Commission to pay the costs;**
3. **Orders the Czech Republic, the Kingdom of Denmark, Ireland and the Republic of Finland to bear their own respective costs.**

[Signatures]

* Language of the case: English.