

62019CJ0459

JUDGMENT OF THE COURT (Fifth Chamber)

17 March 2021 (*1)

(Reference for a preliminary ruling – Harmonisation of fiscal legislation – Value added tax (VAT) – Directive 2006/112/EC – Articles 43 and 44 – Place of supply of services to a taxable person acting as such – Place of supply of investment management services received by a charitable organisation for a non-economic business activity from suppliers established outside the European Union)

In Case C-459/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), made by decision of 13 June 2019, received at the Court on 17 June 2019, in the proceedings

The Commissioners for Her Majesty's Revenue & Customs

v

Wellcome Trust Ltd,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

—

Wellcome Trust Ltd, by F. Mitchell, Barrister, and by P. Nathwani, C. Millard and H. Grantham, Solicitors,

—

the United Kingdom Government, by Z. Lavery, acting as Agent, and by E. Mitrophanous, Barrister,

—

Ireland, by M. Browne, J. Quaney and A. Joyce, acting as Agents, and by N. Travers, Senior Counsel,

—

the Spanish Government, by S. Jiménez García, acting as Agent,

—

the European Commission, by R. Lyal and A. Armenia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2020,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Article 44 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 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11) ('the VAT Directive').

2

The request has been made in proceedings between The Commissioners for Her Majesty's Revenue & Customs (United Kingdom) ('HMRC') and Wellcome Trust Ltd ('WTL') concerning the refund of value added tax (VAT) paid in respect of services supplied by investment managers established outside the European Union.

Legal context

European Union law

Directive 2008/8

3

Recital 4 of Directive 2008/8 states:

'For supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the recipient is established, rather than where the supplier is established. For the purposes of rules determining the place of supply of services and to minimise burdens on business, taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them. Similarly, non-taxable legal persons who are identified for VAT purposes should be regarded as taxable persons. These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff.'

The VAT Directive

4

Article 2(1) of the VAT Directive provides:

'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;

...'

5

Article 9 of that directive, in Title III, entitled 'Taxable persons', provides in paragraph 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.'

6

Title V of that directive, relating to the place of taxable transactions, includes, in particular, a Chapter 3, entitled 'Place of supply of services', which is itself subdivided into three sections.

7

Section 1, entitled 'Definitions', contains a single article, Article 43 of the VAT Directive, which is worded as follows:

'For the purpose of applying the rules concerning the place of supply of services:

1.

a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

2.

a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.'

8

Section 2, entitled 'General rules', contains Articles 44 and 45 of that directive.

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Article 44 of the VAT Directive is worded as follows:

'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.'

10

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.'

11

Section 3, entitled 'Particular provisions', contains Articles 46 to 59a of the VAT Directive, which provide for a number of specific instances of places where certain services are deemed to be supplied.

The implementing regulation

12

Recital 19 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, 'the implementing regulation') states:

'It should be clarified that when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person. Communication by the customer of his VAT identification number to the supplier is sufficient to establish that the customer is acting in his capacity as a taxable person, unless the supplier has information to the contrary. It should also be ensured that a single service acquired for the business but also used for private purposes is only taxed in one place.'

13

Chapter V of the implementing regulation, entitled 'Place of taxable transactions', includes, in particular, a Section 4, entitled 'Place of supply of services (Articles 43 to 59 of [the VAT Directive])', which is itself subdivided into 11 subsections.

14

Subsection 2, entitled 'Capacity of the customer', contains a single article, Article 19 of the implementing regulation, which is worded as follows:

'For the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of [the VAT Directive], a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person.'

Unless he has information to the contrary, such as information on the nature of the services provided, the supplier may consider that the services are for the customer's business use if, for that transaction, the customer has communicated his individual VAT identification number.

Where one and the same service is intended for both private use, including use by the customer's staff, and business use, the supply of that service shall be covered exclusively by Article 44 of [the VAT Directive], provided there is no abusive practice.'

United Kingdom law

15

The relevant rules on the place of supply of services have been implemented in United Kingdom law in section 7A of the Value Added Tax Act 1994, which is worded as follows:

'Place of supply of services

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made?

(a)

in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b)

otherwise, in the country in which the supplier belongs.

...

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person?

(a)

is a taxable person within the meaning of Article 9 of [the VAT Directive],

(b)

is registered under this Act,

(c)

is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or

(d)

is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to [VAT],

and the services are received by the person otherwise than wholly for private purposes.’

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

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WTL is the sole trustee of a charitable trust, the Wellcome Trust, which makes grants for medical research. WTL receives income from investments and also has a number of minor activities including sales, catering and rental of properties in respect of which it is registered for VAT. Investment income, which is the source of most of the funding for the grants made, is predominantly from overseas investments in relation to which services are supplied to WTL by investment managers established within and outside the European Union.

17

In the judgment of 20 June 1996, *Wellcome Trust* (C-155/94, EU:C:1996:243), the Court ruled that the concept of ‘economic activities’ within the meaning of Article 4(2) of the 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), a provision which subsequently became Article 9(1) of the VAT Directive, does not include an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust. As a consequence, WTL was denied input tax recovery on the entirety of the costs incurred in relation to its non-EU portfolio.

18

According to the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), the referring tribunal, it is common ground that WTL is a taxable person within the meaning of Articles 2 and 9 of the VAT Directive, that the activities consisting in the purchase and sale of shares and other securities by WTL in the course of the management of the Wellcome Trust’s assets are unchanged from those considered in that judgment, and, finally, that its non-economic activities are not private activities but business activities.

19

The referring tribunal also states that WTL used the services purchased from suppliers established outside the European Union exclusively for its business activity and that it did not use those services for taxable supplies of services within the meaning of Article 2(1) of the VAT Directive. WTL is required to have regard to the charitable status of the trust and is prohibited from engaging in trade.

20

Since 2010, WTL has accounted for VAT on the services supplied to it by investment managers established outside the European Union, in accordance with the reverse charge mechanism provided for in Article 196 of the VAT Directive, on the assumption that the place of supply of those services was the United Kingdom.

21

Between April 2016 and June 2017, WTL submitted claims for refunds on the ground that it had, from its point of view, overaccounted for output tax in relation to those services. In essence, WTL argued that, while it was a taxable person under Articles 2 and 9 of the VAT Directive, it was not a

taxable person 'acting as such' within the meaning of Article 44 of that directive.

22

In its judgment of 10 October 2018, the First-tier Tribunal (Tax Chamber) (United Kingdom) upheld WTL's arguments. After noting that it was not necessary that supplies of services fall within either Article 44 or Article 45 of the VAT Directive, that tribunal found that the national provisions implementing Article 44 of that directive, which identified the 'place of supply of services' as the United Kingdom for taxable persons acting in a business capacity, were non-compliant with Article 44 of the VAT Directive.

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HMRC appealed to the referring tribunal.

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Before that tribunal, HMRC claimed that, first, Article 44 of the VAT Directive applies on the basis of the language and aim of the provision and related provisions and, second, for reasons of legal certainty, a place of supply must be identifiable. As there is, in the present case, no claim that the supplies come within Article 45 of the VAT Directive or that any of the specific rules set out in Articles 46 to 59a of that directive apply, Article 44 of that directive must apply.

25

According to WTL, since it is common ground that it is not a 'taxable person acting as such' for the purposes of Article 2(1) of the VAT Directive when it is engaged in its investment activities, it cannot be a taxable person 'acting as such' within the meaning of Article 44 of that directive either.

26

The referring tribunal states that the resolution of the dispute depends on the determination of the place of supply of the investment management services received by WTL from suppliers established outside the European Union. In order to be able to establish the place of supply of those services, it is necessary to ascertain whether WTL must be regarded as a taxable person 'acting as such', within the meaning of Article 44 of the VAT Directive.

27

In those circumstances the Upper Tribunal (Tax and Chancery Chamber) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1)

Is Article 44 of [the VAT Directive] to be interpreted as meaning that when a taxable person carrying on a non-economic activity consisting of the purchase and sale of shares and other securities in the course of the management of the assets of a charitable trust acquires a supply of investment management services from a person outside of the [European Union] exclusively for the purposes of such activity, it is to be regarded as "a taxable person acting as such"?

(2)

If Question 1 is answered in the negative and Articles 46 to 49 of the [VAT] Directive do not apply, does Article 45 of [that directive] apply to the supply or does neither Article 44 or Article 45 apply to

the supply?’

Consideration of the questions referred

The first question

28

By its first question, the referring tribunal asks, in essence, whether Article 44 of the VAT Directive must be interpreted as meaning that, where a taxable person carrying on a non-economic activity in a business capacity acquires services for the purposes of that non-economic activity, those services must be regarded as being supplied to that taxable person ‘acting as such’, within the meaning of that article.

29

As is apparent from the request for a preliminary ruling, for the purposes of resolving the dispute pending before it, the referring tribunal’s questions concern only the aspect of the common system of VAT relating to the determination of the place where the services are supplied. In that regard, it is apparent from Article 44 that the place of supply of services to a taxable person acting as such is, in principle, the place where that taxable person has established his business.

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It must be observed that the condition set out in Article 44 of the VAT Directive, according to which the taxable person must be acting as such, also appears in Article 2(1) of that directive.

31

In that regard, it is apparent from the case-law of the Court that, for the purposes of applying the latter provision, a taxable person acts as such where he acts for the purposes of his economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive (see, to that effect, judgments of 8 March 2001, *Bakcsi*, C-415/98, EU:C:2001:136, paragraphs 24 and 29, and of 22 March 2012, *Klub*, C-153/11, EU:C:2012:163, paragraph 40).

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As regards the activity at issue in the main proceedings, consisting of the purchase and sale of shares and other securities by WTL, as trustee, in the course of the management of the assets of its charitable trust, the Court has previously held that the concept of ‘economic activity’, within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, did not include an activity of that kind (see, by analogy, judgment of 20 June 1996, *Wellcome Trust*, C-155/94, EU:C:1996:243, paragraph 41).

33

Therefore, in the context of carrying on such an activity, WTL is not a ‘taxable person acting as such’ within the meaning of Article 2(1)(c) of that directive.

34

Nevertheless, contrary to WTL’s contention, it does not necessarily follow that it cannot be regarded as a ‘taxable person acting as such’ for the purposes of the application of Article 44 of that directive either; that article merely provides, as has been established in paragraph 29 above,

that the place where services are supplied to a taxable person acting as such corresponds, in principle, to the place of that taxable person's business.

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Although, given the requirements of unity and consistency in the EU legal order, the terms used by the measures adopted in the same sector must be given the same meaning, that is not so where the EU legislature has expressed a different intention (see, to that effect, judgment of 15 September 2016, Landkreis Potsdam-Mittelmark, C-400/15, EU:C:2016:687, paragraph 37 and the case-law cited).

36

It is apparent from Article 43 of the VAT Directive that the EU legislature wished to give the expression 'taxable person acting as such', within the meaning of Article 44 of that directive, a different meaning from that which it has under Article 2(1) of that directive.

37

In that regard, it should be noted that Article 43(1) of the VAT Directive specifically provides that, for the purpose of applying the rules concerning the place of supply of services, a taxable person who carries out both taxable supplies of services, within the meaning of Article 2(1) of that directive, and activities 'that are not considered to be taxable supplies of ... services in accordance with [that provision] shall be regarded as a taxable person in respect of all services rendered to him'. The EU legislature therefore laid down, in Article 43(1), an extended and derogating definition of the concept of 'taxable person' solely for the purpose of applying the rules concerning the place of supply of services.

38

It follows that, in the light of Article 43(1) of the VAT Directive, a taxable person may be acting, as such, within the meaning of Article 44 of that directive, even when he is acting for the purposes of his non-economic activities.

39

However, an interpretation of Articles 43 and 44 of the VAT Directive cannot lead to a situation in which entities which are taxable persons, within the meaning of Article 43(1) of that directive, and to which services are rendered, are always to be regarded as acting as such.

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It must be borne in mind that a taxable person carrying out a transaction in a private capacity does not act as a taxable person, within the meaning of Article 2(1) of the VAT Directive (see, to that effect, judgment of 9 July 2015, Trgovina Prizma, C-331/14, EU:C:2015:456, paragraph 18 and the case-law cited). Furthermore, in the context of the broad logic of the common system of VAT, the distinction between economic and non-economic activities is made according to criteria that are different from those distinguishing between business use and use for non-business purposes, in particular for private purposes (judgment of 15 September 2016, Landkreis Potsdam-Mittelmark, C-400/15, EU:C:2016:687, paragraph 32).

41

Given that the concept of a 'taxable person acting as such' within the meaning of Article 44 of the

VAT Directive represents an exception, the fact that, solely for the purpose of applying that article, a taxable person who is not acting for the purposes of his economic activities must be regarded as a taxable person acting as such cannot therefore result in that taxable person continuing to fall within the scope of that article when he is acting not only for the purposes of his non-economic activities but also in a non-business capacity, in particular for private purposes.

42

Consequently, for the purpose of applying Article 44 of the VAT Directive, it should be made clear that the taxable person acts as such as regards his non-economic activities in so far as they are carried out in a business capacity.

43

In the present case, as is apparent from the information provided by the referring tribunal, it is common ground that the non-economic activity carried out by WTL, which consists of the purchase and sale of shares and other securities in the course of the management, as trustee, of the assets of the Wellcome Trust, is a business activity, not a private activity, and that it is exclusively for the purposes of that business activity that the investment management services are supplied to WTL by a person established outside the European Union.

44

Such an interpretation is borne out by the legislative context of Article 44 of the VAT Directive. In the first place, recital 4 of Directive 2008/8 states, in particular, that, for supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the recipient is established, and that taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them. However, it is apparent from the last sentence of recital 4 that the provisions implementing those normal rules should not extend to supplies of services received by a taxable person for his own personal use or that of his staff.

45

In the second place, according to recital 19 of the implementing regulation, 'it should be clarified that when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person'. In the same vein, the first paragraph of Article 19 of the implementing regulation provides that, 'for the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of [the VAT Directive], a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person'.

46

Consequently, it must be held that, where a taxable person carrying on a non-economic activity acquires services for the purposes of that non-economic activity, those services are supplied to that taxable person acting as such, within the meaning of Article 44 of the VAT Directive, with the exception of services intended for the private use of the taxable person or for that of his staff.

47

In that regard, WTL's argument in relation to the principle of equal treatment which seeks to challenge such an interpretation must be rejected.

48

It is true that the Court has held that a trustee which is in a position such as that of WTL must, in the light of Article 9 of the VAT Directive, be regarded as confining its activities to managing an investment portfolio in the same way as a private investor (see, by analogy, judgment of 20 June 1996, Wellcome Trust, C-155/94, EU:C:1996:243, paragraph 36).

49

However, it cannot follow from the fact that, in managing an investment portfolio, WTL carries out activities similar to those carried out by a private investor, that WTL is carrying out those activities on a private basis.

50

As is apparent from paragraph 43 above, since that non-economic activity of WTL is not a private activity, its position is not comparable to that of persons who acquire services solely for their own personal use or that of their staff. Unlike them, WTL is, as a taxable person, covered by the common system of VAT.

51

Having regard to all the foregoing considerations, the answer to the first question referred is that Article 44 of the VAT Directive must be interpreted as meaning that, where a taxable person carrying on a non-economic activity in a business capacity acquires services for the purposes of that non-economic activity, those services must be regarded as being supplied to that taxable person 'acting as such', within the meaning of that article.

The second question

52

In view of the reply given to the first question, there is no need to answer the second question referred.

Costs

53

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:

Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008, must be interpreted as meaning that, where a taxable person carrying on a non-economic activity in a business capacity acquires services for the purposes of that non-economic activity, those services must be

regarded as being supplied to that taxable person 'acting as such', within the meaning of that article.

Regan

Ileši?

Juhász

Lycourgos

Jarukaitis

Delivered in open court in Luxembourg on 17 March 2021.

A. Calot Escobar

Registrar

E. Regan

President of the Fifth Chamber

(*1) Language of the case: English.