62019CJ0801
JUDGMENT OF THE COURT (Eighth Chamber)

17 December 2020 (*1)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Exemptions – Article 135(1)(b) and (d) – Definitions of ‘granting of credit’ and ‘other negotiable instruments’ – Complex transactions – Principal supply – Provision of funds in return for payment – Transfer of a bill of exchange to a factoring company and the money obtained to the issuer of the bill of exchange)

In Case C?801/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upravni sud u Zagrebu (Administrative Court, Zagreb, Croatia), made by decision of 15 October 2019, received at the Court on 31 October 2019, in the proceedings

FRANCK d.d. Zagreb

v

Ministarstvo financija Republike Hrvatske Samostalni sektor za drugostupanjski upravni postupak,

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, A. Kumin and F. Biltgen (Rapporteur), Judges,

Advocate General: J. Richard de la Tour,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 17 September 2020,

after considering the observations submitted on behalf of:

–

FRANCK d.d. Zagreb, by V.°A Batarelo, I. Dvojkovi?, L.°W. Vuchetich, T. Sadri?, M.°K. Boha?ek, I.°B. Pav?i?, F. Kralji?kovi? and M. Opa?ak, odvjetnici,

–

the Ministarstvo financija Republike Hrvatske Samostalni sektor za drugostupanjski upravni postupak, by N. Biloglav and by D. Štimac and K. Tudek, acting as Agents,

–

the Croatian Government, by G. Vidovi? Mesarek and M. Greguri? and by B. Domitrovi?, acting as Agents,

–

the European Commission, by M. Mataija and by A. Armenia and N. Gossement, 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 Article 135(1)(d) 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 FRANCK d.d., Zagreb (‘Franck’) against the Ministarstvo financija Republike Hrvatske, Samostalni sektor za drugostupanjski upravni postupak (Ministry of Finance of the Republic of Croatia, Administrative Judicial Service, the ‘Ministry of Finance’) concerning the determination of the value added tax (VAT) due in respect of the remuneration received by Franck in return for making available to Konzum d.d. funds obtained from factoring companies holding bills of exchange issued by the latter and whose repayment was guaranteed by Franck.

Legal context

European Union law

3

Article 2(1) of the VAT Directive states:

‘The following transactions shall be subject to VAT:

(a)

the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…

(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 that 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

Under Article 135(1) of the VAT Directive:

‘Member States shall exempt the following transactions:

…

(b)

the granting and the negotiation of credit and the management of credit by the person granting it;

…

(d)

transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

…’

Croatian law

6

Article 40(1) of the Zakon o porezu na dodanu vrijednost (Law on VAT) of 17 June 2013, (Narodne novine, br. 73/13, 99/13, 148/13, 153/13, 143/14 et 115/16, ‘Law on VAT’), provides:

‘The following shall be exempt from VAT:

…

(b)

the granting of credits and loans, including acting as an intermediary in such transactions, and the management of credits and loans when the person granting them does so;

…

(d)

transactions, including the activity of intermediary, in the field of savings, current or transfer accounts, payments, transfers, debts, cheques and other transferable instruments, with the exception of debt collection;

…’

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

7

Franck, a trading company engaged in the processing of tea and coffee, has, during the period from 1 January 2013 to 30 March 2017, made funds available to Konzum, a retail chain, in return for the simultaneous conclusion of three types of contracts.

8

First, pursuant to a contract known as the ‘financial loan agreement’, Konzum, designated as the lender, issued a bill of exchange to Franck, designated as the borrower, who undertook to pay the sum mentioned in that bill of exchange to it in cash.

9

Secondly, in accordance with a contract known as the ‘contract for the assignment of trade receivables’, the signatories of which were Franck, Konzum and a factoring company, Franck transferred the bill of exchange to the latter company which, by a transaction known as ‘reverse factoring’, paid 95% to 100% of the amount thereof to Franck, who transferred that amount to Konzum’s account while acting as guarantor of its repayment on the due date of the bill of exchange.

10

Thirdly, by a contract known as the ‘commercial cooperation agreement’, Konzum undertook to reimburse Franck for the interest and costs charged to Franck by the factoring company and to pay it a remuneration amounting to 1% of the amount mentioned in the bill of exchange.

11

In the course of an audit, the competent tax authority found that the remuneration had been invoiced without VAT. Considering that it was not exempt from VAT, the tax authority established, for the period between 2013 and 2017, a shortfall of declared VAT amounting to 15060 808.80 Croatian kuna (HRK) (approximately EUR 2 million) plus interest for late payment. In a decision of 28 July 2018, the Ministry of Finance rejected the complaint lodged by Franck against that tax notice.

12

Hearing the appeal against that judgment, the Upravni sud u Zagrebu (Administrative Court, Zagreb, Croatia) observed that, according to Franck, it had, in substance, provided a service granting loans to Konzum which was exempt from VAT under Article 40(1)(b) of the Law on VAT. Moreover, in so far as the bills of exchange issued by Konzum were negotiable instruments within the meaning of paragraph 1(d) thereof, the service provided by Franck was also exempt under that provision.

13

According to that court, the Ministry of Finance, on the other hand, was of the opinion that the remuneration received by Franck was the consideration for a debt collection service for which the latter acted as an intermediary between the factoring companies and Konzum, which was not exempt from VAT, pursuant to Article 40(1)(d) of the Law on VAT. The Ministry of Finance thus

considers that there was no credit relationship between Franck and Konzum, nor can the transactions in question be qualified as ‘factoring’ between them, as the bills of exchange were not issued on the basis of the supply of goods or services by Franck.

14

In those circumstances, the Upravni sud u Zagrebu (Administrative Court, Zagreb) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1)

Can a service involving funds being made available by the applicant, which is not a financial institution, for payment of a one-off fee of 1% of a particular amount, be regarded as ‘the granting and the negotiation of credit and the management of credit by the person granting it’ within the meaning of Article 135(1)(b) of the VAT Directive, despite the fact that the applicant is not formally referred to as the lender in the contract?

(2)

Is a bill of exchange, that is to say a security containing an obligation on the issuer to pay a specific amount of money to the person designated as the creditor in the security in question or to the person who subsequently acquired that security in an manner prescribed by law, regarded as an “other negotiable instrument” within the meaning of Article 135(1)(d) of the VAT Directive?

(3)

Does the applicant’s service, by which, for a fee of 1% of the amount of the bill of exchange charged to the issuer thereof, it transferred the bill of exchange obtained to a factoring company, and transferred the amount obtained from the factoring company to the issuer of the bill of exchange, and guaranteed to the factoring company that the issuer of the bill of exchange will pay the liability arising from the bill of exchange when it becomes due, constitute:

(a)

a service exempt from VAT under Article 135(1)(b) of the VAT Directive; or

(b)

a service exempt from VAT under Article 135(1)(d) of the VAT Directive?’

The jurisdiction of the Court

15

The main dispute concerns the period from 1 January 2013 to 30 March 2017, when the Republic of Croatia joined the European Union on 1 July 2013.

16

According to settled case-law, the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State’s accession to the European Union (judgment of 3 July 2019, UniCredit Leasing, C?242/18, EU:C:2019:558, paragraph 30 and the case-law cited).

17

Since the facts in the main proceedings occurred in part after that date, the Court has jurisdiction to answer the questions referred for a preliminary ruling (see, to that effect, judgment of 3 July 2019, UniCredit Leasing, C?242/18, EU:C:2019:558, paragraph 32 and the case-law cited).

Consideration of the questions referred

18

By its questions, which must be considered together, the national court asks, in substance, whether Article 135(1)(b) and (d) of the VAT Directive must be interpreted as meaning that the exemption from VAT laid down in those provisions, in respect of granting credit and transactions concerning other negotiable instruments, applies to a transaction which consists in making available funds by one taxable person to another, for remuneration, obtained from a factoring company following the transfer to the latter of a bill of exchange issued by the second taxable person, the first taxable person guaranteeing the repayment to the factoring company of that bill of exchange on its maturity.

19

First of all, as regards the applicability of the VAT Directive, it follows from Article 2(1) thereof that, in particular, supplies of goods and services effected for consideration within the territory of a Member State by a taxable person acting as such are subject to VAT. Pursuant to the first subparagraph of Article 9(1) of that directive, a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The concept of ‘economic activities’ is defined in the second subparagraph of Article 9(1) as comprising any activity of producers, traders or persons supplying services.

20

In that connection, it is clear from settled case-law that a taxable person for VAT purposes in respect of an economic activity which he carries out permanently must be regarded as a ‘taxable person’ in respect of any other economic activity carried out occasionally, provided that that activity constitutes an activity within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112 (see, to that effect, judgment of 17 October 2019, Paulo Nascimento Consulting, C?692/17, EU:C:2019:867, paragraph 24 and the case-law cited).

21

In the present case, the transaction at issue in the main proceedings, consisting in the provision of funds in return for remuneration, constitutes an ‘economic activity’ within the meaning of Article 9(1) of the VAT Directive. The fact that that transaction is not part of Franck’s main activity, which is the processing of tea and coffee, does not exclude a finding that the company, by carrying out that transaction, acted within the framework of its economic activity.

22

Secondly, it should be noted that the transaction at issue in the main proceedings, as described in paragraphs 6 to 9 of the present judgment, consists of a series of transactions by which three legal persons, namely Franck, Konzum and a factoring company, participated in performance of three separate types of contract.

23

In that regard, it is clear from the Court’s case-law that, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether that operation gives rise, for the purposes of VAT, to two or more distinct supplies or to one single supply (judgment of 4 September 2019, KPC Herning, C?71/18, EU:C:2019:660, paragraph 35 and the case-law cited).

24

Accordingly, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, separately, to taxation or exemption, must be considered to be a single transaction when they are not independent (judgment of 4 September 2019, KPC Herning, paragraph 37 and the case-law cited).

25

A supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. That is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (judgment of 4 September 2019, KPC Herning, C?71/18, EU:C:2019:660, paragraph 38 and the case-law cited).

26

In that context, it should be noted, first, that, in determining whether a transaction involving several supplies constitutes a single transaction for VAT purposes, the Court takes into account both the economic objective of that transaction and the interests of the recipients of the supplies (see, to that effect, judgment of 8 December 2016, Stock ‘94, C?208/15, EU:C:2016:936, paragraph 29 and the case-law cited).

27

Second, it is important to recall that, in the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether the taxable person makes a single supply in a particular case and to make all definitive findings of fact in that regard. However, it is for the Court to provide the national courts with all the guidance as to the interpretation of European Union law which may be of assistance in adjudicating on the case pending before them (judgment of 8 December 2016, Stock ‘94, EU:C:2016:936, paragraph 30 and the case-law cited).

28

In the present case, it is common ground that the economic purpose of the transaction at issue in the main proceedings was to satisfy Konzum’s capital requirements, as Konzum was unable to borrow funds from financial institutions in Croatia due to its level of indebtedness and that of the group to which it belonged.

29

It follows, subject to verification by the national court, that the main service provided by Franck

must be regarded as being the making available to Konzum of the funds which Franck obtained from a factoring company. The other services provided by the company in execution of the three types of contracts to which it was a party must be considered as ancillary to this main service, without any objective independent of the latter.

30

Thirdly, as regards the question whether such a supply falls within one or more of the exemptions referred to in Article 135(1) of the VAT Directive, it should be recalled that, as is settled case-law, these exemptions constitute autonomous concepts of Union law which are intended to avoid divergences in the application of the VAT system of one Member State to another (judgment of 2 July 2020, Blackrock Investment Management (UK), C?231/19, EU:C:2020:513, paragraph 21 and the case-law cited).

31

Furthermore, the terms used to specify the exemptions covered by Article 135(1) of the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (judgment of 2 July 2020, Blackrock Investment Management (UK), C?231/19, EU:C:2020:513, paragraph 22 and the case-law cited).

32

Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (judgment of 2 July 2020, Veronsaajien oikeudenvalvontayksikkö (Computer Room Service), C?215/19, EU:C:2020:518, paragraph 39 and the case-law cited).

33

It is in the light of the foregoing considerations that it must be examined whether a supply such as that referred to in paragraph 28 of this judgment falls within the scope of the exempt transactions referred to in Article 135(1)(b) and (d) of the VAT Directive.

34

As regards Article 135(1)(b) of the VAT Directive, it should be borne in mind that the transactions exempted under that provision are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service, so that the application of those exemptions is not dependent on the status of the entity providing those services (judgment of 15 May 2019, Vega International Car Transport and Logistic, C?235/18, EU:C:2019:412, paragraph 43 and the case-law cited).

35

In particular, the expression ‘granting and negotiating credit’ in the said provision must be interpreted broadly so that its scope cannot be limited to loans and credits granted by banking and financial institutions only. Such an interpretation is borne out by the objective of the common system introduced by the VAT Directive, which aims, in particular, to secure equal treatment for taxable persons (see, in particular, judgment of 15 May 2019, Vega International Car Transport

and Logistic, C?235/18, EU:C:2019:412, paragraphs 44 and 45).

36

On the other hand, it follows from the case-law of the Court that the granting of credit, within the meaning of Article 135(1)(b) of the VAT Directive, consists, inter alia, in the provision of capital against remuneration (see, to that effect, judgment of 17 October 2019, Paulo Nascimento Consulting, C?692/17, EU:C:2019:867, paragraph 38).

37

If such remuneration is secured, inter alia, by the payment of interest, other forms of consideration cannot be excluded. Thus, the Court has already had occasion to consider as constituting a financial transaction similar to the granting of a credit and therefore exempt from VAT under that provision, the advance financing of the purchase of goods in return for an increase in the amount reimbursed by the recipient of that financing (see, to that effect, judgment of 15 May 2019, Vega International Car Transport and Logistic, C?235/18, EU:C:2019:412, paragraphs 47 and 48).

38

As regards the dispute in the main proceedings, it follows from the foregoing that the fact that Franck is not a banking or financial institution does not preclude a supply such as that made by the latter from constituting granting credit within the meaning of Article 135(1)(b) of the VAT Directive. It is for the national court to verify, for the purposes of the exemption provided for in that provision for such a service, that the remuneration which Franck received from Konzum constitutes the consideration for making the funds concerned available to it.

39

Furthermore, it is irrelevant that the funds made available were reimbursed not to Franck but to the factoring companies. Indeed, as the Commission points out in its written observations, Article 135(1)(b) of the VAT Directive does not make that exemption subject to an obligation to repay the loans to the person who granted them.

40

As regards, in the first place, the exemptions laid down in Article 135(1)(d) of the VAT Directive, it should be recalled that, according to that provision, Member States are to exempt transactions involving, inter alia, ‘deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments’.

41

As the Court has ruled, such transactions, including those involving ‘other negotiable instruments’, fall within the field of financial transactions and concern, in particular, payment instruments whose mode of operation involves a transfer of money (see, to that effect, judgments of 12 June 2014, Granton Advertising, C?461/12, EU:C:2014:1745, paragraphs 36 to 38, and of 22 October 2015, Hedqvist, C?264/14, EU:C:2015:718, paragraph 40).

42

As regards the main proceedings, the bills of exchange issued by Konzum must be regarded as ‘negotiable instrument’ within the meaning of Article 135(1)(d) of the VAT Directive in so far as, as it follows from the order for reference, they contain an obligation on Konzum, as issuer, to pay the

specified amount to the holder on their maturity.

43

This conclusion is not invalidated by the fact that, contrary to this obligation, Konzum was referred to in the contracts relating to the bills of exchange as a lender and Franck as a borrower.

44

It must be recalled that, contrary to the formal consideration of the parties to the contract, economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, judgment of 22 November 2018, MEO – Serviços de Comunicações e Multimedia, C?295/17, EU:C:2018:942, paragraph 43 and the case-law cited).

45

In order for a supply, such as the one carried out by Franck, to be regarded as a transaction concerning other negotiable instruments, exempt under Article 135(1)(d) of the VAT Directive, that supply must form a distinct whole, assessed as a whole, which has the effect of fulfilling the specific and essential functions of such a transaction. In that regard, a service exempted under the VAT Directive must be distinguished from the supply of a mere physical or technical service (see, to that effect, judgments of 22 October 2015, Hedqvist, C?264/14, EU:C:2015:718, paragraph 39, and of 26 May 2016, Bookit, C?607/14, EU:C:2016:355, paragraph 40).

46

In the present case, it is clear from the order for reference that the service consisting in the provision of funds was intrinsically linked to the issue of the bills of exchange, since it was by transferring them to the factoring companies that Franck procured from the latter the amounts which it made available to Konzum. In so far as Franck was a party to the contracts relating to the bills of exchange, it appears that it performed the specific and essential functions for a transaction relating to them, although that is a matter for the referring court to ascertain.

47

Therefore, subject to that verification, a supply, such as that referred to in paragraph 28 of this judgment, must be regarded as a transaction concerning other negotiable instruments, exempt from VAT pursuant to Article 135(1)(d) of the VAT Directive.

48

However, in its written observations, the Croatian Government submits that the service provided by Franck constitutes a debt collection service which, in accordance with Article 135(1)(d) of the VAT Directive, is excluded from the exemption referred to in that provision. In that regard, Franck would have acted as an intermediary between the factoring companies and Konzum, in that it would have taken over the latter’s debt and remitted it to the said companies with a view to its repurchase, while assuming, as guarantor of the debt, the risk of default by the debtor.

49

That argument cannot be accepted.

50

Although the transaction by which a business purchases debts, assuming the risk of the debtor's default, in return for remuneration, constitutes debt collection and factoring excluded from the exemption laid down by that provision (see, to that effect, judgment of 26 June 2003, MKG-Kraftfahrzeuge-Factoring, C?305/01, EU:C:2003:377, paragraph 80) it appears, however, subject to verification by the referring court, that, in the present case, Franck has neither carried out such a transaction nor acted as an intermediary for the factoring companies in that context. On the contrary, it is apparent from the decision to refer that the remuneration it received was paid by Konzum in return for the provision of funds. In addition, Franck paid interest and costs to the factoring companies, which were subsequently reimbursed by Konzum.

51

Furthermore, the fact, relied on by the Croatian Government, that the transaction at issue in the main proceedings was aimed at circumventing Croatian banking regulations prohibiting banks from granting loans to a company such as Konzum on account of its level of indebtedness is irrelevant for the purposes of VAT exemption.

52

According to settled case-law, the principle of fiscal neutrality precludes, as regards the levying of VAT, a generalised differentiation between unlawful and lawful transactions (judgment of 10 November 2011, The Rank Group, C?259/10 and C?260/10, EU:C:2011:719, paragraph 45 and the case-law cited). The possible unlawful nature of the transaction at issue in the main proceedings cannot therefore be taken into account for the purposes of the exemption under Article 135(1)(b) and (d) of the VAT Directive.

53

In the light of all the foregoing considerations, the questions referred is that Article 135(1)(b) and (d) of the VAT Directive must be interpreted as meaning that the exemption from VAT on granting credit and transactions concerning other negotiable instruments laid down by those provisions, applies to a transaction which consists in the making available of funds obtained from a factoring company by one taxable person to another taxable person, for remuneration, following the transmission to the latter of a bill of exchange issued by the second taxable person, the first taxable person guaranteeing the repayment to the factoring company of that bill of exchange at its maturity.

Costs

54

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 (Eighth Chamber) hereby rules:

Article 135(1)(b) and (d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) must be interpreted as meaning that the exemption from value added tax on granting credit and transactions concerning other negotiable instruments laid down by those provisions, applies to a transaction which consists in the making available of

funds obtained from a factoring company by one taxable person to another taxable person, for remuneration, following the transmission to the latter of a bill of exchange issued by the second taxable person, the first taxable person guaranteeing the repayment to the factoring company of that bill of exchange at its maturity.

[Signatures]

(*1) Language of the case: Croatian.