62019CJ0931
JUDGMENT OF THE COURT (Tenth Chamber)

3 June 2021 (*1)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Articles 43 and 45 – Directive 2006/112/EC, as amended by Directive 2008/8/EC – Articles 44, 45 and 47 – Provision of services – Point of reference for tax purposes – Concept of a 'fixed establishment' – Letting a property in a Member State – Owner of a property with its registered office on the island of Jersey)

In Case C?931/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzgericht (Federal Finance Court, Austria), made by decision of 20 December 2019, received at the Court on 20 December 2019, in the proceedings

Titanium Ltd

v

Finanzamt Österreich, formerly Finanzamt Wien,

THE COURT (Tenth Chamber),

composed of M. Ileši?, President of the Chamber, E. Juhász (Rapporteur) and C. Lycourgos, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–

the Austrian Government, by A. Posch and F. Koppensteiner and by J. Schmoll, acting as Agents,

–

the European Commission, by L. Mantl and R. Lyal, 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 Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and Directive 2006/112, as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11; 'Directive 2006/112, as amended').

2

The request has been made in proceedings between Titanium Ltd, established in Jersey, and the Finanzamt Österreich, formerly Finanzamt Wien (Tax authority of Austria, formerly tax authority of the city of Vienna, Austria) ('the tax authority'), concerning the levying of value added tax (VAT) on rental income relating to a property located in Austria for the tax years 2009 and 2010.

Legal context

European Union law

Directive 2006/112

3

Title V of Directive 2006/112, entitled 'Place of taxable transactions', included, inter alia, a Chapter 3, entitled 'Place of supply of services', which contained Articles 43 to 59 of that directive.

4

Article 43 of Directive 2006/112 provided:

'The place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied, or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

5

Article 45 of that directive stated:

'The place of supply of services connected with immovable property, including the services of estate agents and experts, and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the property is located.'

6

According to Article 193 of Directive 2006/112:

'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.'

7

Article 194 of that directive provided that:

'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.’

8

Article 196 of that directive provided:

‘VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied or by any person identified for VAT purposes in the Member State in which the tax is due to whom the services referred to in Articles 44, 47, 50, 53, 54 and 55 are supplied, if the services are supplied by a taxable person not established in that Member State.’

Directive 2006/112, as amended

9

Directive 2008/8 made amendments, with effect from 1 January 2010, to Directive 2006/112, in particular the provisions of that directive found in Chapter 3 of Title V and Article 196 of that directive.

10

Article 44 of Directive 2006/112, as amended, 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 is 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.’

11

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.’

12

Article 47 of the directive is worded as follows:

‘The place of supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, the granting of rights to use immovable property and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision,

shall be the place where the immovable property is located.’

13

Articles 193 and 194 of Directive 2006/112, as amended, are identical to Articles 193 and 194 of Directive 2006/112.

14

Under Article 196 of Directive 2006/112, as amended:

‘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 (EU) No 282/2011

15

Recital 14 to 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) states:

‘To ensure the uniform application of rules relating to the place of taxable transactions, concepts such as the place where a taxable person has established his business, fixed establishment, permanent address and the place where a person usually resides should be clarified. While taking into account the case-law of the Court of Justice, the use of criteria which are as clear and objective as possible should facilitate the practical application of these concepts.’

16

Article 11 of that implementing regulation provides:

‘1. For the application of Article 44 of Directive 2006/112/EC, 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 Directive 2006/112/EC;

(b)

from 1 January 2013, the second subparagraph of Article 56(2) of Directive 2006/112/EC;

(c)

until 31 December 2014, Article 58 of Directive 2006/112/EC;

(d)

Article 192a of Directive 2006/112/EC.

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.’

17

Implementing Regulation No 282/2011, which entered into force on the 20th day following its publication, that is to say, on 12 April 2011, became applicable from 1 July 2011, in accordance with Article 65 of that regulation.

Austrian law

18

Paragraph 19(1) of the Umsatzsteuergesetz 1994 (Law on turnover tax 1994, BGBl. 663/1994) (‘UStG’), in the version applicable until 31 December 2009, provided:

‘The person liable for payment of VAT shall be the trader in the situations referred to in points (1) and (2) of Paragraph 1(1) and the issuer of the invoice in the situations referred to in Paragraph 11(14).

In respect of other services (with the exception of consideration in respect of the use of federal roads) and for the supply of works, the tax shall be payable by the person to whom the services are supplied where:

–

the trader providing the services has no permanent address (principal place of business), place where the person usually resides or permanent establishment (Betriebsstätte) in the national territory, and

–

the person receiving the services is a trader or a legal person governed by public law.

The trader providing the services is liable for that tax.’

19

Paragraph 19(1) of the UStG, in the version applicable from 1 January 2010, is worded as follows:

‘The person liable for payment of VAT shall be the trader in the situations referred to in points (1) and (2) of Paragraph 1(1) and the issuer of the invoice in the situations referred to in Paragraph 11(14).

In respect of other services (with the exception of consideration in respect of the use of federal roads) and for the supply of works, the tax shall be payable by the person to whom the services are supplied where:

–

the undertaking providing the service has, in the national territory, no permanent address (principal place of business), place where the person usually resides or permanent establishment (Betriebsstätte) involved in the provision of the service, and

–

the person receiving the service is a trader as provided for in points (1) and (2) of Paragraph 3a(5), or a legal person governed by public law which is a non-trader as provided for in point (3) of Paragraph 3a(5).

The trader providing the services is liable for the tax.’

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

20

Titanium is a company whose registered office and management are located in Jersey and whose corporate purpose is property management, asset management and the management of housing and accommodation.

21

During the tax years 2009 and 2010, that company let, subject to tax, a property which it owned in Vienna (Austria) to two Austrian traders.

22

In order to carry out those transactions, which were Titanium’s only activities in Austria, Titanium appointed an Austrian real estate management company to act as intermediary between the service providers and suppliers, to invoice rental payments and operating costs, to maintain business records and to prepare the VAT declaration data. Those services were carried out by the agent in premises which were not the property belonging to Titanium.

23

However, Titanium retained the decision-making power to enter into and terminate leases, to determine the economic and legal conditions of the tenancy agreements, to make investments and repairs and to organise their financing, to choose third parties intended to provide other upstream services and, finally, to select, appoint and oversee the real estate management company itself.

24

Although Titanium had taken the view that it was not liable to pay VAT in respect of its activity of letting the property, on the ground that it did not have a permanent establishment in Austria, the tax authority’s view was that a property which was rented out constituted such a permanent establishment and, consequently, the tax authority determined an amount of VAT chargeable to that company for the tax years 2009 and 2010.

25

Titanium brought an action before the Bundesfinanzgericht (Federal Finance Court, Austria) against the tax authority’s decisions, claiming that, in the absence of staff, the property which it rented out could not be regarded as being a permanent establishment.

26

For its part, the tax authority pointed out that, under the Umsatzsteuerrichtilinien 2000 (Guidelines on Turnover Tax 2000), a trader who owns immovable property in Austria that he lets, subject to tax, must be treated as a national trader and that the person to whom the services are supplied is not liable to pay the tax on that transaction. Accordingly, there is always a permanent establishment where immovable property is let.

27

In that regard, the referring court states that the national provision which it must apply is Paragraph 19(1) of the UStG, which provides that the tax liability is transferred to the person to whom the services are supplied if the trader does not carry on its business in national territory or does not have a permanent establishment (Betriebsstätte) there. The referring court states that that provision transposed not only Article 196 of Directive 2006/112 but also Article 194 of that directive.

28

The referring court also notes that it follows from the judgments of 17 July 1997, ARO Lease (C?190/95, EU:C:1997:374), and of 7 May 1998, Lease Plan (C?390/96, EU:C:1998:206), that the concept of ‘fixed establishment’ presupposes that the supplier must actually have its own staff and that using the staff of another appointed trader is insufficient for such a concept to be established.

29

In that regard, the referring court points out that several German tax courts have held that, although it does not use any human resources, a wind farm may be regarded as constituting a fixed establishment where such a farm has a significant value and has a maximum degree of stability. It states that, however, to date, the Bundesfinanzhof (Federal Finance Court, Germany) has made no ruling on that issue.

30

The referring court accordingly is unsure regarding the concept of ‘fixed establishment’ in respect of an activity which, as for the activity in the main proceedings, does not make use of any technical and human resources for its performance.

31

In those circumstances, the Bundesfinanzgericht (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the concept of “fixed establishment” to be interpreted as meaning that the existence of human and technical resources is always necessary and therefore that the service provider’s own staff must be present at the establishment, or can – in the specific case of the letting, subject to tax, of a property situated in national territory, which constitutes only a passive tolerance of an act or situation whereby the supplier authorises a third party to do something that the latter could not do without such authorisation (Duldungsleistung) – that property, even without human resources, be regarded as a “fixed establishment”?’

Consideration of the question referred

The admissibility of the question referred

32

The Austrian Government submits that Article 45 of Directive 2006/112 and Article 47 of Directive 2006/112, as amended, which provide that the place of supply of services connected with immovable property is the place where the property is located, are, contrary to Article 43 of Directive 2006/112 and Article 44 of Directive 2006/112 as amended, applicable to the case at issue in the main proceedings.

33

From that, it infers that Article 194 of Directive 2006/112 and Article 194 of Directive 2006/112, as amended, are applicable in that case and not, as the referring court suggests, Article 196 of Directive 2006/112 and Article 196 of Directive 2006/112, as amended.

34

In that regard, the Republic of Austria submits that Article 194 of Directive 2006/112 and Article 194 of Directive 2006/112 as amended provide the Member States with a right to choose and entrusts them with the task of determining the conditions for the application of those provisions, by deciding whether or not to transfer the tax debt to the recipient of the service, such that the choice made by the Austrian legislature makes the question referred by the national court redundant.

35

From that, the Republic of Austria concludes that the concept of ‘fixed establishment’ has nothing to do with the case at issue in the main proceedings, which justifies the request for a preliminary ruling being declared inadmissible.

36

In that regard, it must be recalled that, in accordance with the Court’s settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 29 April 2021, Ubezpieczeniowy Fundusz Gwarancyjny, C?383/19, EU:C:2021:337, paragraph 29 and the case-law cited).

37

It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for this Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 1 October 2020, Úrad špeciálnej prokuratúry, C?603/19, EU:C:2020:774, paragraph 28 and the case-law cited).

38

In the present case, the referring court stated, in a document of 19 August 2020 disclosed to the Court, that the question referred to the Court relates in general terms to the interpretation of the concept of ‘fixed establishment’ found in Directive 2006/112 and in Implementing Regulation No 282/2011 and that that question does not contain any specific reference to Article 194 or Article 196 of that directive. It pointed out that the question whether the main proceedings fall within the scope of one or other of those articles is ultimately ancillary, given that both of those articles raise the question of the State in which the taxable person is established, which means that, in both cases, it is necessary to decide whether or not there is a fixed establishment.

39

Therefore, the legal position of the Republic of Austria is not the only possible interpretation which could be adopted and cannot therefore render the question referred inadmissible.

Substance

40

By its question, the referring court asks, in essence, whether a property which is let in a Member State constitutes a fixed establishment within the meaning of Article 43 of Directive 2006/112 and Articles 44 and 45 of Directive 2006/112 as amended, in the circumstance where the owner of that property does not have his or her own staff to perform services relating to the letting.

41

As a preliminary point, it should be noted that the referring court does not specify whether it wishes to consider whether that property may be characterised as a fixed establishment of a taxable person receiving or, by contrast, supplying services relating to the letting of that property. Nevertheless, it is possible to answer the question referred by taking both those situations into consideration.

42

The concept of ‘fixed establishment’, in accordance with the Court’s settled case-law, implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services. It thus requires a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis (judgment of 28 June 2007, Planzer Luxembourg, C?73/06, EU:C:2007:397, paragraph 54 and the case-law cited). In particular, a structure without its own staff cannot fall within the scope of the concept of a ‘fixed establishment’ (see, to that effect, judgment of 17 July 1997, ARO Lease, C?190/95, EU:C:1997:374, paragraph 19).

43

That case-law is supported by Article 11 of Implementing Regulation No 282/2011, according to which a fixed establishment is characterised, inter alia, by a suitable structure ‘in terms of human and technical resources’. While it is true that that implementing regulation became applicable, by virtue of Article 65 thereof, only from 1 July 2011 and therefore does not apply ratione temporis to the case in the main proceedings, recital 14 to that implementing regulation states that it seeks to clarify certain concepts, including the concept of ‘fixed establishment’, taking into account the case-law of the Court.

44

In the present case, it is apparent from the documents before the Court that the applicant in the main proceedings does not have any staff of its own in Austria and that the persons responsible for certain management tasks were contractually appointed by that company, which reserved for itself all important decisions concerning the letting of the property in question.

45

A property which does not have any human resource enabling it to act independently clearly does not satisfy the criteria established by the case-law to be characterised as a fixed establishment within the meaning of both Directive 2006/112 and Directive 2006/112, as amended.

46

Consequently, the answer to the question referred is that a property which is let in a Member State in the circumstance where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a fixed establishment within the meaning of Article 43 of Directive 2006/112 and of Articles 44 and 45 of Directive 2006/112, as amended.

Costs

47

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 (Tenth Chamber) hereby rules:

A property which is let in a Member State, in the circumstance where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a fixed establishment within the meaning of Article 43 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and of Articles 44 and 45 of Directive 2006/112, as amended by Council Directive 2008/8/EC of 12 February 2008.

[Signatures]

(*1) Language of the case: German.