Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

27 October 2022 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 44 – Point of reference for tax purposes – Transfer of greenhouse gas emission allowances – Recipient involved in VAT evasion in a chain of transactions – Taxable person who knew or should have known about that evasion)

In Case C?641/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzgericht (Federal Finance Court, Austria), made by decision of 11 October 2021, received at the Court on 20 October 2021, in the proceedings

Climate Corporation Emissions Trading GmbH

v

Finanzamt Österreich,

THE COURT (Eighth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Third Chamber, acting as President of the Eighth Chamber, N. Jääskinen and M. Gavalec, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Climate Corporation Emissions Trading GmbH, by W. Standfest, Rechtsanwalt,

– the European Commission, by A. Armenia and B.?R. Killmann, 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 the provisions 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 Climate Corporation Emissions

Trading GmbH (‘Climate Corporation’) and the Finanzamt Österreich (Tax Office, Austria) concerning the imposition of value added tax (VAT) on transactions consisting of the transfer of greenhouse gas emission allowances.

Legal context

European Union law

3 Article 2(1) of the VAT Directive provides:

‘1. The following transactions shall be subject to VAT:

…

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State …:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…’

4 Under Title V of that directive, entitled ‘Place of taxable transactions’, Chapter 3, entitled ‘Place of supply of services’, includes Article 44 of that directive, which provides:

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

5 Article 44 stems from Directive 2008/8, which amended Directive 2006/112 as regards the place of supply of services. Recitals 3 and 4 of Directive 2008/8 are worded as follows:

‘(3) For all supplies of services the place of taxation should, in principle, be the place where the actual consumption takes place. If the general rule for the place of supply of services were to be altered in this way, certain exceptions to this general rule would still be necessary for both administrative and policy reasons.

(4) 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. …’

6 Under Title IX of the VAT Directive, entitled ‘Exemptions’, Chapter 1, entitled ‘General provisions’, includes Article 131 of that directive, which provides:

‘The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.’

7 Title IX also contains Chapter 4, entitled ‘Exemptions for intra-Community transactions’. Within Chapter 4, Article 138(1) of the VAT Directive provides:

‘Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the [European] Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.’

8 Article 196 of that directive provides:

‘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.’

9 The first paragraph of Article 273 of that directive states:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.’

Austrian law

10 Paragraph 3a(6) of the Umsatzsteuergesetz (Law on turnover tax) of 23 August 1994 (BGBl. 663/1994), in the version applicable to the facts of the main proceedings (BGBl. I 52/2009) provides:

‘Without prejudice to subparagraphs 8 to 16 and Article 3a, other supplies made to a trader within the meaning of points 1 and 2 of subparagraph 5 shall be deemed to be made at the place from which the recipient carries on his or her business. If, however, the other supply is made at the fixed establishment of a trader, the location of the fixed establishment shall be decisive.’

11 It is apparent, in that regard, from the order for reference that the concepts of ‘trader’ and ‘other supplies’ used in that provision correspond, respectively, to the concepts of ‘taxable person’ and ‘supply of services’ used in EU law.

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

12 From 1 to 20 April 2010, Climate Corporation, whose registered office is in Baden (Austria), transferred, for consideration, greenhouse gas emission allowances to Bauduin Handelsgesellschaft mbH (‘Bauduin’), whose registered office is in Hamburg (Germany).

13 By a turnover tax assessment notice in respect of 2010, adopted on 27 January 2012, the Finanzamt Baden Mödling (Tax Office, Baden Mödling, Austria) categorised those transfers of greenhouse gas emission allowances as a taxable ‘supply of goods’ which do not fall under the tax exemption for intra-Community supplies. According to that Tax Office, Bauduin, participated, as a ‘missing trader’, in a fraudulent VAT carousel and Climate Corporation knew or should have known that those allowances would be used for the purposes of VAT evasion.

14 On 27 February 2012, Climate Corporation brought an action against that notice before the referring court, the Bundesfinanzgericht (Federal Finance Court, Austria).

15 That court notes that the transfers of greenhouse gas emission allowances must be classified as a ‘supply of services’ and not as a ‘supply of goods’, as is apparent from the judgment of 8 December 2016, *A and B* (C?453/15, EU:C:2016:933).

16 That court states that, in those circumstances, under the provisions of Article 44 of the VAT Directive, Paragraph 3a(6) of Law on turnover tax and German law, the place where the services were supplied by Climate Corporation to Bauduin is in Germany. Those supplies are therefore not taxable in Austria, but in Germany, and Bauduin is liable for VAT in the latter Member State.

17 According to the findings of the referring court, Climate Corporation should have known that the allowances sold to Bauduin were being used for fraudulent purposes of VAT evasion.

18 In that regard, the referring court observes that, in the context of transactions consisting of intra-Community supplies of goods, the Court has held, in the judgment of 18 December 2014, *Schoenimport ‘Italmoda’ Mariano Previti and Others* (C?131/13, C?163/13 and C?164/13, EU:C:2014:2455), that the benefit of the right to a VAT exemption for such a supply, the right to deduction of input VAT and the right to a VAT refund must be refused to a taxable person who knew, or should have known, that, by the transaction relied on as a basis for those rights, he or she was participating in VAT evasion committed in the context of a chain of supplies.

19 That court asks whether that case-law is applicable, by analogy, to the provision of cross-border services. Such an application would mean that, in a case such as that in the main proceedings, the place of supply of services would have to be regarded as being in Austria and not in Germany, despite the contrary wording of Article 44 of the VAT Directive and the corresponding national provisions.

20 The answer to that question is not obvious, since there are both similarities and differences between intra-Community supplies of goods and the provision of cross-border services within the European Union.

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

‘Is [the VAT Directive] to be interpreted as meaning that the national authorities and courts must regard the place of supply of services, which, under the written law, is formally located in the other Member State, in which the recipient of that supply is established, as being within the national territory, where the domestic taxable person supplying that service should have known that, in supplying it, he or she was participating in VAT evasion committed in the context of a chain of transactions?’

Admissibility of the request for a preliminary ruling

22 Climate Corporation disputes the admissibility of the request for a preliminary ruling. First, the question referred for a preliminary ruling is hypothetical. Since the transaction at issue in the main proceedings is not taxable in Austria, but in Germany, it is not for an Austrian court to ask the Court of Justice to clarify the hypothetical tax obligations of a taxable person in another Member State. Second, that question proceeds from a reasoning by analogy derived from the judgment of 18 December 2014, *Schoenimport ‘Italmoda’ Mariano Previti and Others* (C?131/13, C?163/13 and C?164/13, EU:C:2014:2455), which cannot be followed in view of the differences between the circumstances of the dispute in the main proceedings and those of the case which led to that judgment.

23 In that regard, it is should be borne in mind that, according to settled case-law of the Court of Justice, 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 the 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 bears no relation to the actual facts of the main action or its purpose, 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 (judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 31 and the case-law cited, and of 21 February 2018, *Kreuzmayr*, C?628/16, EU:C:2018:84, paragraph 23 and the case-law cited).

24 In the present case, it is clear from the order for reference that the referring court does not seek clarification of the obligations of a taxable person in a Member State other than that in which that court has its jurisdiction. On the contrary, it seeks, in essence, to determine whether, under EU law, the tax authorities of the Member State in which it has its jurisdiction may impose VAT on the transactions which are the subject of the main proceedings even though, in its view, the place of those transactions is located in another Member State. It follows that that request is not hypothetical.

25 Furthermore, since Climate Corporation questions the possibility of transposing, by analogy, the lessons learned from the judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C?131/13, C?163/13 and C?164/13, EU:C:2014:2455), to a case such as that in the main proceedings, it suffices to note that that argument is covered by the answer on the merits to the question referred for a preliminary ruling.

26 Accordingly, the request for a preliminary ruling is admissible.

Consideration of the question referred

27 By its question, the referring court seeks, in essence, to ascertain whether the provisions of the VAT Directive must be interpreted as precluding, in the case of a supply of services by a taxable person established in one Member State to a taxable person established in another Member State, the authorities of the former Member State from taking the view that the place of that supply – which, pursuant to Article 44 of that directive, is located in that other Member State – is nonetheless deemed to be located in the former Member State where the supplier concerned knew, or should have known, that he or she was, by that supply, participating in VAT evasion committed by the recipient of that supply in a chain of transactions.

28 At the outset, it should be stated that, as the referring court noted, transactions consisting in the transfer, for consideration, of greenhouse gas emission allowances must be classified as a supply of services within the meaning of the VAT Directive (see, to that effect, judgment of 8 December 2016, *A and B*, C?453/15, EU:C:2016:933, paragraph 30).

29 The place of supply of services must be determined in accordance with the provisions of Chapter 3 of Title V of the VAT Directive. In that regard, sections 2 and 3 of that chapter set out, respectively, the general rules for determining the place of taxation of supplies of services and particular provisions relating to specific supplies of services (see, to that effect, judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 37).

30 The object of those provisions determining the point of reference for tax purposes of supplies of services is to avoid, first, conflicts of jurisdiction which may result in double taxation

and, second, non-taxation of revenue (judgments of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 42 and the case-law cited, and of 7 May 2020, *Dong Yang Electronics* , C?547/18, EU:C:2020:350, paragraph 25).

31 By thus determining in a uniform manner the point of reference for tax purposes of supplies of services, those provisions delimit the competences of the Member States and set out a rational delimitation of the respective areas covered by national rules on VAT (see, to that effect, judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraphs 50 and 51).

32 In that context, Article 44 of the VAT Directive lays down a general rule for determining the place of supply of services.

33 Under that general rule, the place of supply of services to a taxable person acting as such is to be the place where that person has established his or her 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 or she has established his or her business, the place of supply of those services is to be the place where that fixed establishment is located. In the absence of such a place of establishment or fixed establishment, the place of supply of services is to be the place where the taxable person who receives such services has his or her permanent address or usually resides.

34 In the scheme of Article 44 of the VAT Directive, the place where the taxable person has established his or her business is the primary point of reference for determining the place of supply of services, while the other two points of reference it sets out are by way of exception and in the alternative, respectively (see, to that effect, judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraphs 53 to 56).

35 Furthermore, no provision of that directive lays down a specific rule for the purposes of determining the place of taxation of a transaction consisting of the transfer, for consideration, of greenhouse gas emission allowances.

36 It follows that, under Article 44 of the VAT Directive, the place of a transaction which consists of the transfer, for consideration, by a taxable person established in one Member State of greenhouse gas emission allowances to another taxable person established in another Member State is located in that latter Member State.

37 In the present case, it is apparent from the explanations provided by the referring court that, under Article 44 of the VAT Directive and the corresponding provisions of national law concerned, the place of the transactions at issue in the main proceedings is located in the Member State of the recipient of the services supplied, namely Germany, and that, under Article 196 of that directive and the corresponding provisions of that national law, it is that recipient which is liable to pay VAT to the Treasury. However, that recipient allegedly committed VAT evasion of which the supplier of the services concerned should have known.

38 In the light of those preliminary remarks, it is necessary to determine whether, despite the clear wording of Article 44 of the VAT Directive, the place of a transaction, which consists of the transfer, for consideration, by a taxable person established in one Member State, of greenhouse gas emission allowances to a taxable person established in another Member State, may be deemed to be in the Member State of the supplier where that transaction involves VAT evasion.

39 In that regard, it is settled case-law of the Court of Justice that EU law cannot be relied on for abusive or fraudulent ends (judgments of 6 July 2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraph 54; of 18 December 2014, *Schoenimport ‘Italmoda’ Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 43;

and of 15 September 2022, *HA.EN.*, C?227/21, EU:C:2022:687, paragraph 27).

40 Thus, the Court has held that national authorities and courts may, or must, in principle, refuse the benefit of the rights laid down by the VAT Directive when they are claimed fraudulently or abusively, such as the right to an exemption in respect of an intra-Community supply of goods. That is the position not only where tax evasion has been carried out by the taxable person him or herself but also where a taxable person knew, or should have known, that, by the transaction concerned, he or she was participating in VAT evasion carried out by the supplier or by another trader acting upstream or downstream in the chain of transactions (see, to that effect, judgments of 7 December 2010, *R.*, C?285/09, EU:C:2010:742, paragraphs 51 and 52; of 6 September 2012, *Mecsek-Gabona*, C?273/11, EU:C:2012:547, paragraph 54; of 9 October 2014, *Traum*, C?492/13, EU:C:2014:2267, paragraph 42; and of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraphs 49 and 50).

41 However, in the first place, unlike the cases which gave rise to the case-law recalled in paragraph 40, the present case concerns not the reliance on a right, such as the right to an exemption in respect of an intra-Community supply of goods, but the determination of the place of a taxable transaction.

42 An interpretation according to which, in the case of VAT evasion, the place of supply of services may be deemed to be in a Member State other than that determined under the provisions of the VAT Directive relating to the determination of the place of supply of services would run counter to the objectives and the general scheme of those provisions, as reflected in paragraphs 30 and 31 of this judgment.

43 Such an interpretation would amount to varying the allocation of fiscal competence between the Member States as it emerges from those provisions. In a situation such as that in the present case, it would have the practical effect of transferring, in the absence of any legal basis, the fiscal competence of the Member State in which the recipient of the services concerned is established to the Member State in which the supplier of that service is established.

44 Furthermore, it is important to recall that the underlying logic of the provisions relating to the determination of the place of supply of services and which is also reflected in recitals 3 and 4 of Directive 2008/8 and in Article 44 of the VAT Directive, requires taxation to be carried out as far as possible at the place where the services concerned are consumed (see, by analogy, judgment of 8 December 2016, *A and B*, C?453/15, EU:C:2016:933, paragraph 25 and the case-law cited). An interpretation such as that envisaged in paragraph 42 of this judgment would ultimately amount to transferring tax revenue to a Member State other than that of final consumption of those services.

45 In the second place, it is true that, from a factual point of view, a supply of services by a taxable person established in one Member State to a taxable person established in another Member State is similar to an intra-Community supply of goods, since both involve persons established in two Member States. The fact remains that, as EU law currently stands, the legal rules governing intra-Community supplies of goods and those of cross-border supplies of services within the European Union are distinct.

46 As regards the rules governing the former, any intra-Community supply of goods, for the purposes of Article 138 of the VAT Directive, has as its corollary an intra-Community acquisition of those goods for the purposes of Article 2(1)(b) of that directive. The intra-Community supply and the intra-Community acquisition, which forms a second chargeable event, are one and the same economic transaction, in respect of which fiscal competence is shared between the Member State where dispatch of goods began and the Member State of arrival of those goods, which are responsible, respectively, for the exercise of the powers conferred on them (see, to that effect,

judgment of 27 September 2007, *Teleos and Others*, C?409/04, EU:C:2007:548, paragraphs 22 to 24).

47 Thus, an intra-Community supply of goods is exempted in the Member State where dispatch of those goods began, without prejudice to the right to deduction or refund of input VAT paid in that Member State, whereas the intra-Community acquisition is subject to VAT in the Member State of arrival (see, to that effect, judgment of 7 December 2010, *R.*, C?285/09, EU:C:2010:742, paragraph 38 and the case-law cited).

48 The Member State where dispatch of the goods began may therefore, if necessary, refuse to grant an exemption pursuant to its competence under Article 131 of the VAT Directive and for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any evasion, avoidance or abuse (see, to that effect, judgment of 7 December 2010, *R.* , C?285/09, EU:C:2010:742, paragraph 51).

49 By contrast, that system of intra-Community transactions is not applicable to cross-border supplies of services within the European Union, in respect of which only one Member State, determined under the provisions of the VAT Directive, has fiscal competence.

50 Thus, in contrast to the competence conferred on the Member State where dispatch began of goods which are the subject of an intra-Community supply of goods, as set out in paragraphs 46 to 48 of this judgment, the Member State of establishment of a supplier in respect of a supply of services provided to a taxable person established in another Member State, the place of that supply of services being located, under Article 44 of the VAT Directive, in that other Member State, does not have any competence under that directive to impose VAT on such a supply.

51 Therefore, the case-law referred to in paragraph 40 of this judgment cannot be applied by analogy to determining the place of supply of services.

52 It follows from the foregoing that the place of supply of services cannot be altered in disregard of the clear wording of Article 44 of the VAT Directive on the ground that the transaction at issue is vitiated by VAT evasion.

53 That said, under Article 273 of the VAT Directive, Member States may take measures to ensure the correct collection of the tax and to prevent evasion. However, those measures must not go beyond what is necessary to attain such objectives. It is, in principle, for the tax authorities to carry out the necessary inspections on taxable persons in order to detect VAT irregularities and VAT evasion and to impose penalties on the taxable person who committed those irregularities or that evasion (see, to that effect, judgments of 27 September 2007, *Collée*, C?146/05, EU:C:2007:549, paragraph 40 and the case-law cited; of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraphs 57 and 62; and of 1 July 2021, *Tribunal Económico Administrativo Regional de Galicia*, C?521/19, EU:C:2021:527, paragraph 38).

54 In the light of all the foregoing considerations, the answer to the question referred is that the provisions of the VAT Directive must be interpreted as precluding, in the case of a supply of services by a taxable person established in one Member State to a taxable person established in another Member State, the authorities of the former Member State from taking the view that the place of that supply – which, pursuant to Article 44 of that directive, is located, in that other Member State – is nonetheless deemed to be located in the former Member State where the supplier knew, or should have known, that he or she was, by that supply, participating in VAT evasion committed by the recipient of that supply in a chain of transactions.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

The provisions 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 precluding, in the case of a supply of services by a taxable person established in one Member State to a taxable person established in another Member State, the authorities of the former Member State from taking the view that the place of that supply – which, pursuant to Article 44 of Directive 2006/112, as amended by Directive 2008/8, is located in that other Member State – is nonetheless deemed to be located in the former Member State where the supplier knew, or should have known, that he or she was, by that supply, participating in VAT evasion committed by the recipient of that supply in a chain of transactions.

[Signatures]

* Language of the case: German.