Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

11 July 2024 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Sixth Directive 77/388/EEC – Article 2(1) – Article 4(4), second subparagraph – Taxable persons – Option for Member States to treat as a single taxable person, known as a 'VAT group', persons who, while legally independent, are closely bound to one another by financial, economic and organisational links – Services provided within the VAT group – Taxation of such services – Recipient of the services not entitled to deduct VAT – Risk of tax losses)

In Case C-184/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Fiscal Court, Germany), made by decision of 26 January 2023, received at the Court on 22 March 2023, in the proceedings

Finanzamt T

v

S,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot (Rapporteur), S. Rodin and L.S. Rossi, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– S, by R.J. Schwerin and D. Sommerfeld, Rechtsanwälte,

– the German Government, by M.J. Möller and A. Hoesch, acting as Agents,

– the European Commission, by B. Eggers and M. Herold, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1) and the second subparagraph of Article 4(4) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive').

2 The request has been made in proceedings between the Finanzamt T (Tax Office, Germany) and S, a German foundation governed by public law, concerning that foundation's liability for value added tax (VAT) for the 2005 tax year.

Legal context

European Union law

3 The Sixth Directive was repealed and replaced from 1 January 2007 by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, in view of the date of the facts at issue in the dispute in the main proceedings, the dispute continues to be governed by the Sixth Directive.

4 Article 2 of the Sixth Directive provided:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

5 Article 4 of that directive provided:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

…

4. The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organizational links.

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

…'

6 Under Article 6(2) of that directive:

'The following shall be treated as supplies of services for consideration:

…

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.'

7 Article 13(A)(1)(b) of that directive provided:

‘1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

…

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature.’

8 Article 17(2) of the Sixth Directive provided:

‘In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…’

9 Article 11 of Directive 2006/112 provides:

‘After consulting the advisory committee on [VAT] (hereafter, the ‘VAT Committee’), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.’

German law

10 Paragraph 2(2) of the Umsatzsteuergesetz (Law on Turnover Tax), in the version applicable to the dispute in the main proceedings (‘the UStG’), is worded as follows:

‘The industrial activity, commercial activity, craft or professional activity is not exercised independently:

…

2. if, in the light of the overall actual circumstances, a legal entity is financially, economically and organisationally integrated into the undertaking of the controlling company (tax group). The effects of the affiliation are limited to internal supplies between the constituent parts of the undertaking located in the country. These constituent parts are to be treated as a single undertaking. …’

11 Paragraph 3(9a), point 2, of the UStG provides:

‘The following shall be treated as another supply for consideration:

…

2. the performance of other services free of charge by a trader for purposes other than those of that trader’s business or for the private use of that trader’s staff, provided that they are not courtesy gifts [to them].’

The facts of the main proceedings and the questions referred for a preliminary ruling

12 It is apparent from the order for reference that S is a German foundation governed by public law, which is the controlling company of a university, which also manages a university medicine department, and of the company U-GmbH.

13 In 2005, the company U-GmbH provided S with cleaning, hygiene and laundry services, as well as patient transport services. The cleaning services were provided in respect of all of the building complex forming the university medicine department, including patients' rooms, corridors, operating theatres, lecture rooms and laboratories.

14 S carries out economic activities in the building complex for which it is subject to VAT, but it uses the lecture rooms and other parts of that complex for teaching students, which it carries out as a public authority and for which it is not regarded as a taxable person for the purposes of VAT. It is submitted that the proportion of the surface area of that building complex dedicated to those teaching activities amounts to 7.6% of the total surface area of that complex.

15 On 3 November 2005, following an audit, the tax authority adjusted S's VAT assessment for the year 2005.

16 In the first place, concluding that S's establishments formed a single undertaking, of which S was the controlling company, the tax authority was of the view that a single VAT declaration had to be drawn up and, consequently, a single tax assessment had to be issued.

17 In the second place, the tax authority concluded that, under Paragraph 2(2), point 2 of the UStG, the cleaning services provided by U-GmbH to S were services provided within the tax group (*Organschaft*) formed by S and U-GmbH and that, therefore, those services were not subject to VAT.

18 However, the tax authority was also of the view that, in so far as those services had been carried out for S's activities for which it is not considered to be subject to VAT, they had been carried out 'for purposes other than that of the business' and had given rise, in favour of S, to a 'supply of services free of charge, treated as a supply of services for consideration' in accordance with Paragraph 3(9a), point 2, of the UStG, which implemented Article 6(2)(b) of the Sixth Directive.

19 On that basis, the tax authority increased the amount of VAT due from S.

20 S lodged an administrative complaint against that decision, which was rejected.

21 The Finanzgericht (Finance Court, Germany) upheld the action brought by S against that decision concerning the increase in VAT. In that regard, it concluded that the tax group (*Organschaft*) which comprised, within a single undertaking, the controlling company S and U-GmbH, extended to S's activities carried out as a public authority and that the conditions provided for in Paragraph 3(9a), point 2, of the UStG, were not met.

22 The tax authority brought an appeal on a point of law against that judgment before the referring court, the Bundesfinanzhof (Federal Fiscal Court, Germany). That court referred the matter to the Court of Justice for a preliminary ruling in order to determine whether the German regulations relating to tax groups complied with EU law and whether Article 6(2)(b) of the Sixth Directive was applicable.

23 That request for a preliminary ruling gave rise to the judgment of 1 December 2022, *Finanzamt T (Internal supplies within a VAT group)* (C-269/20, EU:C:2022:944). In that judgment, the Court considered that the second subparagraph of Article 4(4) of the Sixth Directive did not preclude a Member State from designating, as a single taxable person of a VAT group, the controlling company of that group, where that controlling company is in a position to impose its will on the other entities forming part of that group and provided that that designation does not entail a risk of tax losses. The Court also held that EU law must be interpreted as meaning that, in the case where such a controlling company carries out economic activities for which it is subject to VAT and activities in the exercise of its powers as a public authority, in respect of which it is not considered to be a taxable person liable for VAT under Article 4(5) of that directive, the provision of services, by an entity forming part of that group, in connection with that exercise of powers must not be taxed under Article 6(2)(b) of that directive.

24 The referring court concludes that it is necessary to refer the matter again to the Court of Justice, in the context of the same dispute, on the question whether supplies made for consideration between persons belonging to the same VAT group fall within the scope of application of VAT, pursuant to Article 2(1) and the second subparagraph of Article 4(4) of the Sixth Directive. It is of the view that there is uncertainty in that regard, taking into account the Court's statements in paragraphs 77 to 80 of the judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943).

25 The referring court also queries whether it is appropriate, in any case, to make such supplies subject to VAT, where the recipient of those supplies is not or is only partly authorised to deduct input tax due or paid, in order to avoid a 'risk of tax losses', taking into account the principles resulting from the judgments of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943) and of 1 December 2022, *Finanzamt T (Internal supplies within a VAT group)* (C-269/20, EU:C:2022:944).

26 In those circumstances, the Bundesfinanzhof (Federal Fiscal Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the bringing together of several persons into a single taxable person, as provided for in the second subparagraph of Article 4(4) of [the Sixth Directive], have the effect of removing [supplies] made for consideration between those persons from the scope of [VAT] as defined in Article 2(1) of that directive?

(2) Do [supplies] made for consideration between those persons fall within the scope of [VAT] in any event in the case where the recipient of the [supply] is not (or is only partly) entitled to deduct input tax, as there is otherwise a risk of tax losses?'

Consideration of the questions referred

27 By its two questions, which are to be examined together, the referring court is asking, in essence, whether Article 2(1) and the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as meaning that services provided for consideration between persons belonging to the same VAT group must be subject to VAT and whether the fact that the recipient of that service cannot deduct input VAT due or paid must be taken into account on the grounds that such a situation would entail a risk of tax losses.

28 It must be borne in mind, at the outset, that, under Article 2(1) of the Sixth Directive, supplies of goods or services made for consideration within the territory of the country by a taxable person acting as such are subject to VAT.

29 Under Article 4(1) of that directive, a 'taxable person' means any person who independently carries out any economic activity specified in Article 4(2) of that directive, whatever the purpose or results of that activity.

30 In addition, it follows from the Court's case-law that a supply of services is subject to VAT only if there exists between the service supplier and the recipient a legal relationship in which there is a reciprocal performance, the remuneration received by the supplier constituting the value actually given in return for the service supplied to the recipient (see, to that effect, judgment of 24 January 2019, *Morgan Stanley & Co International*, C-165/17, EU:C:2019:58, paragraph 37, and the case-law cited).

31 To establish whether such a legal relationship exists, it is necessary to determine whether the service supplier carries out an independent economic activity, in particular in that it bears the economic risk arising from its business (see, to that effect, judgments of 17 September 2014, *Skandia America (USA), filial Sverige*, C-7/13, EU:C:2014:2225, paragraph 25, and of 24 January 2019, *Morgan Stanley & Co International*, C-165/17, EU:C:2019:58, paragraph 35).

32 As for the question whether services provided between members of the same VAT group must be subject to VAT, it should be noted, taking into account the questions raised by the referring court, that the Court did not rule on that question in the judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943).

33 In paragraphs 77 to 80 of that judgment, referred to more particularly by the referring court, the question examined was whether a Member State can classify, 'by categorization', given entities as being non-independent, for the purposes of Article 4(1) and the first subparagraph of Article 4(4) of the Sixth Directive, when those entities are financially, economically and organisationally integrated into the controlling company of a VAT group.

34 It is apparent from paragraphs 23 and 28 to 30 of that judgment that that question was asked by the same referring court which made the present request for a preliminary ruling in order to assess whether the German system regarding a tax group (*Organschaft*) could be 'justified', in any event, by means of a combined reading of Article 4(1) and the first subparagraph of Article 4(4) of the Sixth Directive.

35 Therefore, the case-law resulting from the judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943), does not prejudge the answer that should be given to the question whether the services provided between members of the same VAT group falls within the scope of VAT.

36 In order to answer that question, it is important, however, to take into account whether those members belonged to the same VAT group and the specific rules laid down in the second subparagraph of Article 4(4) of the Sixth Directive (see, to that effect, judgment of 11 March 2021, *Danske Bank*, C-812/19, EU:C:2021:196, paragraph 22).

37 According to the wording of that provision, each Member State may treat as 'a single taxable person' persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organizational links.

38 In addition, it follows from settled case-law that the effect of implementing the scheme established in the second subparagraph of Article 4(4) of the Sixth Directive is that national legislation adopted on the basis of that provision allows entities which have such links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person and that, where that provision is implemented by a Member State, the closely linked entity or entities within the meaning of that provision cannot be treated as a taxable person or persons within the meaning of Article 4(1) of the Sixth Directive (see, to that effect, judgments of 22 May 2008, *Ampliscientifica and Amplifin*, C-162/07, EU:C:2008:301, paragraph 19; of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie*, C-141/20, EU:C:2022:943, paragraph 45; and of 1 December 2022, *Finanzamt T (Internal supplies within a VAT group)*, C-269/20, EU:C:2022:944, paragraph 39).

39 Therefore, the treatment of a VAT group as a single taxable person under the second subparagraph of Article 4(4) of the Sixth Directive precludes members of the VAT group from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations. That provision therefore necessarily requires, where it is implemented by a Member State, the national implementing legislation to provide that the taxable person is a single taxable person and that a single VAT number be allocated to the group (see, to that effect, judgments of 22 May 2008, *Ampliscientifica and Amplifin*, C-162/07, EU:C:2008:301, paragraphs 19 and 20, and of 1 December 2022, *Finanzamt T (Internal supplies within a VAT group)*, C-269/20, EU:C:2022:944, paragraph 40).

40 As noted by the Advocate General, in points 44 and 45 of his Opinion, it follows that a supplier belonging to a VAT group cannot, when the Member State has implemented such a scheme, be treated, individually, as a separate taxable person from the taxable person constituted by the VAT group, with the result that there is no need to determine whether that supplier meets the independence condition laid down in Article 4(1) of the Sixth Directive when it provides a service for consideration to another entity of that VAT group. Accordingly, such provision of service cannot fall within the scope of VAT under Article 2(1) of that directive.

41 Lastly, it is important to note that the VAT Committee, established in Article 398 of Directive 2006/112, carried out an identical analysis regarding the VAT group referred to in Article 11 of that directive in the guidelines resulting from the 119th meeting of that committee of 22 November 2021, which state that the treatment of a VAT group as a single taxable person precludes the members of that

group from continuing to operate, within and outside their group, as individual taxable persons for VAT purposes. While such a document does not have binding effect, nevertheless constitutes an aid to the interpretation of the Sixth Directive (see, by analogy, order of 8 October 2020, *Weindel Logistik Service*, C-621/19, EU:C:2020:814, paragraph 48).

42 Similarly, point 3.4.3 of the communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax (COM(2009) 325 final), relating to 'Intra-group supplies', states that transactions between members of the same VAT group do not exist for VAT purposes.

43 As to whether it is appropriate to distinguish the particular case where the provider of such a service cannot rely on the right to deduct input VAT due or paid, on the ground that there exists, in that case, a 'risk of tax losses', it is important, at the outset, to recall that, within the framework of a VAT group, the right to deduct input VAT due or paid is conferred on the group itself and not on its members.

44 Furthermore, in the judgments of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943), and of 1 December 2022, *Finanzamt T (Internal supplies within a VAT group)* (C-269/20, EU:C:2022:944), which the referring court has cited in its order for reference, the condition concerning the need to avoid a risk of tax losses, to which the Court has referred, related to a different question from that examined in the present case.

45 As is apparent from paragraph 60 of the judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943), and paragraph 53 of the judgment of 1 December 2022, *Finanzamt T (Internal supplies within a VAT group)* (C-269/20, EU:C:2022:944), that question concerned the possibility for a Member State to designate, not the VAT group itself, but the controlling company of that group to fulfil the role of a single taxable person. As recalled in paragraph 23 of the present judgment, the Court considered that that could be the case if that designation led to the same result, as regards tax revenue, as in the case where the VAT group were itself liable for that tax (see, to that effect, judgments of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie*, C-141/20, EU:C:2022:943, paragraphs 57 to 59, and of 1 December 2022, *Finanzamt T (Internal supplies within a VAT group)*, C-269/20, EU:C:2022:944, paragraphs 50 to 52).

46 By contrast, the 'risk of tax losses' which the referring court mentions in its second question results, a priori, not from the application of conditions specific to the VAT group regime which are also specific to the law of a Member State but rather from the application of the common VAT system laid down by the Sixth Directive and the rules relating to the deduction of input VAT due or paid which it lays down.

47 In the light of the above, the answer to the questions referred is that Article 2(1) and the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as meaning that services provided for consideration between persons belonging to the same VAT group are not subject to VAT, even where the VAT due or paid by the recipient of those services cannot be subject to an input deduction.

Limitation of temporal effects

48 The German government has requested the Court to limit the temporal effects of the present judgment in the event that the Court answers the first or second question in the affirmative.

49 Taking into account the answer given to the two questions asked by the referring court, there is no need to respond to that request.

Costs

50 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 (Fourth Chamber) hereby rules:

Article 2(1) and the second subparagraph of Article 4(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment ('the Sixth Directive')

must be interpreted as meaning that services provided for consideration between persons belonging to the same group – formed by persons who, while legally independent, are closely bound to one another by financial, economic and organisational links – designated as a single taxable person by a Member State, are not subject to value added tax (VAT), even where the VAT due or paid by the recipient of those services cannot be subject to an input deduction.

[Signatures]

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* Language of the case: German.