

Case C-812/19

Request for a preliminary ruling

Date lodged:

4 November 2019

Referring court:

Högsta förvaltningsdomstolen (Sweden)

Date of the decision to refer:

24 October 2019

Appellant:

Danske Bank A/S, Danmark, Sverige Filial

Other party to the proceedings:

Skatteverket

[...]

APPELLANT

Danske Bank A/S, Danmark, Sverige Filial [...]

[...] Stockholm

OTHER PARTY TO THE PROCEEDINGS

Skatteverket [...] Solna

DECISION UNDER APPEAL

Decision of the Skatterättsnämnden (Revenue Law Commission, Sweden) of 23 November 2018 in Case No 37-17/1

MATTER

Preliminary decision on value added tax ('VAT'); need to obtain a preliminary ruling from the Court of Justice of the European Union

[...]

ORDER

A preliminary ruling under Article 267 of the FEU Treaty shall be obtained from **[OR. 2]** the Court of Justice of the European Union in accordance with the annexed request for such a preliminary ruling [...]

[...] **[OR. 3]**

[...]

Reference for a preliminary ruling under Article 267 TFEU concerning the interpretation of Articles 2(1), 9(1) and 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').

Introduction

- 1 A bank in another Member State provides services to its branch in Sweden and imputes the costs thereof to the branch. The bank is part of a VAT group in that other Member State, while the branch is not part of a VAT group in Sweden. The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) seeks clarification, by a preliminary ruling, of whether the VAT group constitutes, for the purpose of the supply of services, a taxable person independent of the branch and whether, as a result, the branch constitutes an independent taxable person.

Relevant EU law

- 2 Under Article 2(1)(c) of the VAT Directive, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.
- 3 In accordance with Article 9(1), a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. **[OR. 4]**
- 4 It follows from Article 11 that, after consulting 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.

Relevant national legislation

- 5 In accordance with the first subparagraph of Chapter 1, Paragraph 1, of the mervärdesskattelagen (1994:200) (the Law on value added tax (1994:200); 'the ML'), VAT is to be paid on such supply within national territory of taxable services effected by a taxable person acting as such, in so far as the taxable person is not exempt from taxation on the supply.
- 6 Under 1 Chapter 2, Paragraph 1, third subparagraph, point 1, of the ML, the term 'supply of services' means that a service is carried out, transferred or otherwise provided for consideration.
- 7 A service supplied to a taxable person acting as such is regarded, in accordance with the general rule in the first subparagraph of Chapter 5, Paragraph 5, to have been supplied within national territory if the taxable person either has the seat of his economic activity in Sweden or has a permanent establishment there and the service was provided to that establishment. Chapter 1, Paragraph 2, first subparagraph, point 2 [of the ML] provides that if a person supplying services such as those referred to in Chapter 5, Paragraph 5, is a foreign taxable person, the person who acquires the services is liable to pay VAT, inter alia, if that person is a taxable person or a legal person registered in Sweden for VAT.
- 8 In accordance with Chapter 4, Paragraph 1, a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. [OR. 5]
- 9 Sweden has introduced rules on VAT groups into Chapter 6a [of the ML]. It follows from Paragraph 1 of that Chapter that, for the purposes of the application of the law, two or more taxable persons, on the conditions set out in the chapter, may be regarded as a single taxable person (VAT group) and the activity carried out by the VAT group may be regarded as a single activity. The second subparagraph of Paragraph 2 provides that only a taxable person's permanent establishments in Sweden may form part of a VAT group.

The facts of the case

Request for a preliminary decision

- 10 The case concerns a preliminary decision of the Skatterättsnämnden (Revenue Law Commission) which is the subject of an appeal before the Högsta förvaltningsdomstolen (Supreme Administrative Court) by Danske Bank A/S, Danmark, Sverige Filial. The following, inter alia, is clear from the application for a preliminary decision.
- 11 Danske Bank A/S has its principal establishment in Denmark. The bank carries on its activities in Sweden through the branch. The bank is a member of a Danish VAT group. The branch is not a member of any Swedish VAT group.

- 12 The bank uses an IT platform in its Nordic activities, which are to a great extent common to all the establishments. The costs of the branch's use of the platform in the Swedish activity will be imputed by the principal establishment to the branch.
- 13 By its application, the branch wished to know whether the fact that the bank was part of a Danish VAT group means that the VAT group must be regarded as an independent taxable person vis a vis its branch in Sweden for the purpose of applying the provisions of the ML. **[OR. 6]**
- 14 The branch also wished to know whether the services of the Danish VAT group, the costs of which will be imputed to the branch, are to be regarded as a supply for VAT purposes, whether the branch must pay VAT on the acquisitions in Sweden and whether the taxable amount is the sum of the attributed costs.

The Skatterättsnämnden's preliminary decision

- 15 The Skatterättsnämnden found that the branch and the Danish VAT group in Denmark of which the principal establishment forms part are to be regarded as two distinct taxable persons, since the Danish principal establishment separated itself from the Swedish branch by entering into a Danish VAT group in accordance with Danish VAT rules.
- 16 The Skatterättsnämnden further found that the supply of services by the Danish VAT group, the cost of which is attributed to its branch in Sweden, constitutes a supply of services entailing a tax liability for the branch, provided that the remuneration received by the VAT group constitutes the consideration actually given for the services provided and that the other conditions for tax liability are satisfied. The remainder of the application was rejected as inadmissible in that it was not answered.

Positions of the parties

The branch

- 17 The branch asks the Högsta förvaltningsdomstolen (Supreme Administrative Court) for a declaration that the branch and the principal establishment are one and the same taxable person and that the attribution by the principal establishment does not constitute a supply for the purposes of VAT. **[OR. 7]**
- 18 A supply of services is taxable only if there exists between the service supplier and the recipient a legal relationship in which there is a reciprocal performance. In order to determine whether there is a legal relationship between a foreign company and one of its establishments situated in another Member State, it is necessary to examine whether that establishment carries out an independent economic activity.

- 19 The branch does not act independently and does not itself bear the economic risks inherent in the branch's activity. The branch is therefore dependent on the principal establishment and thus cannot be regarded as a taxable person. The principal establishment and the branch are therefore the same taxable person even when the principal establishment is part of a VAT group. The branch cannot separate itself from the principal establishment unless the branch itself becomes a member of a Swedish VAT group.

The Skatteverket

- 20 The Skatteverket (Swedish Tax Agency) is of the view that the Högsta förvaltningsdomstolen (Supreme Administrative Court) should confirm the preliminary decision.
- 21 The assessment must be made in the light of the Danish rules on VAT groups. The Danish provisions mean that it is only establishments in Denmark which may form part of a Danish VAT group. It follows that the branch in Sweden is not part of the Danish VAT group. Accordingly, the branch and the principal establishment cannot be regarded as forming a single taxable person.

The need for a preliminary ruling

- 22 It follows from the case-law of the Court of Justice that a supply of services is taxable only if there exists between the service supplier [OR. 8] and the recipient a legal relationship in which there is a reciprocal performance. In one case, the Court held that a branch of a foreign company was not independent of that company and that there was no legal relationship between those companies. The fact that, since the principal establishment supplied services to the branch, the costs were apportioned to the branch did not therefore mean that the branch should be regarded as a taxable person (*FCE Bank*, C-210/04, EU:C:2006:196, paragraphs 34 to 37, 40 and 41).
- 23 The relevance of the fact that a branch forms part of a VAT group was examined by the Court of Justice in a case concerning services supplied by a company established in a non-Member State to its Swedish branch, which was a member of a VAT group in Sweden. The Court observed that the branch did not operate independently and did not itself bear the economic risks arising from the exercise of its activity. Nor did the branch have any capital of its own and its assets were included in those of the principal establishment. Consequently, the branch was dependent on the principal establishment and could not therefore itself be characterised as a taxable person within the meaning of Article 9 of the VAT Directive (*Skandia America Corp. (USA), Sweden branch*, C-7/13, EU:C:2014:2225, paragraph 26).
- 24 However, in that same case, the Court held that the branch formed part of a VAT group and that the branch formed, with the other members of the group, a single

taxable person. Classification as a single taxable person means that the members of a VAT group can no longer be treated as taxable persons and that, in such circumstances, services supplied by a third party to a member of a VAT group must therefore be regarded as having been supplied not to the member but to the group itself. Services supplied for consideration by a company to its branch were deemed to have been supplied to the VAT group and the supply of such services was deemed to constitute a taxable transaction, on the basis that the principal establishment **[OR. 9]** and its branch cannot be considered to be a single taxable person. The Court found that services supplied by a principal establishment in a non-Member State to its branch established in a Member State constitute taxable transactions when the branch is a member of a VAT group (*Skandia America*, paragraphs 29 to 32).

- 25 It is clear from the case-law of the Court that the starting point is that a branch must not be regarded as a taxable person where the principal establishment supplies services to the branch. Consequently, transactions between the branch and the principal establishment are not taxable. It is, however, clear from the case-law that the branch, by entering into a VAT group, may be separated from the principal establishment and instead become part of another taxable person, namely the VAT group. Transactions between the principal establishment and the branch which is part of a VAT group are then taxable.
- 26 However, the question which now arises is whether the Swedish branch, which is not part of any Swedish VAT group, must be regarded as a taxable person where the principal establishment is a member of a VAT group in another Member State and supplies services to it and imputes the costs associated therewith to it. Can the branch which, in its capacity as a branch of the bank and similarly to the branch in the *Skandia America* case, does not act independently, does not itself bear any economic risks and has no capital of its own and is therefore dependant on the bank, be regarded itself as a taxable person (c.f. *Skandia America*, paragraph 26)? The Court of Justice has not yet examined that question.
- 27 One way of looking at such a situation is that the Swedish branch becomes an independent taxable person since the principal establishment, by becoming a member of a VAT group, has separated itself from the taxable person which the principal establishment and its branch together are deemed to constitute in transactions between them. The principal establishment thus becomes part of another taxable person, namely the VAT group, and the branch becomes an **[OR. 10]** independent taxable person. On that view, the transactions between the branch and the principal establishment are taxable.
- 28 Another way of looking at the situation is that the branch is part of the same taxable person as the principal establishment, even if the principal establishment is part of a VAT group in another Member State, since the branch is not independent of the principal establishment when it is not part of a VAT group in the State in which it is established. On that view, the transactions between the branch and the principal establishment are not taxable transactions and the branch is regarded in

practice as simply another branch and a part of the VAT group in the other Member State.

- 29 The EU's VAT Committee adopted, following its 105th meeting in October 2015, guidelines on the basis of the judgment of the Court of Justice in the *Skandia America* case. It is apparent from the guidelines that a supply of goods or services by one entity to another entity of the same legal person such as 'head office to branch', 'branch to head office' or 'branch to branch', where only one of the entities involved in the transaction is a member of a VAT group or where the entities are members of separate VAT groups, is to constitute a taxable transaction for VAT purposes, provided that the conditions laid down in Article 2(1) of the VAT Directive are met.
- 30 Under the guidelines of the VAT Committee, a branch must therefore be regarded as an independent taxable person in the situation in question. The guidelines were adopted by a large majority. The Högsta förvaltningsdomstolen (Supreme Administrative Court) finds that there is therefore a relatively extensive convergence of views as between the Member States on the present question, but there is not total agreement.
- 31 Against that background, the Högsta förvaltningsdomstolen (Supreme Administrative Court) finds it necessary to request a preliminary ruling from the Court of Justice. [OR. 11]

Question

- 32 Does a Swedish branch of a bank established in another Member State constitute an independent taxable person where the principal establishment supplies services to the branch and imputes the costs thereof to the branch, if the principal establishment is part of a VAT group in the other Member State, while the Swedish branch is not a member of any Swedish VAT group?