Case C-269/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

18 June 2020

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

7 May 2020

Defendant and appellant on a point of law:

Finanzamt T

Applicant and respondent on a point of law:

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Subject matter of the main proceedings

Turnover tax — Second subparagraph of Article 4(4) of Directive 77/388 — Authorisation of the Member States to 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 organisational links — Article 6(2)(b) of Directive 77/388 — Pursuit of an activity carried on in an official capacity in addition to an economic activity

Subject matter and legal basis of the reference for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is the authorisation granted to Member States in 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 to treat

as a single taxable person persons established in their territory who, while legally independent, are closely bound to one another by financial, economic and organisational links to be exercised in such a way that:

a) treatment as a single taxable person is effected through one of those persons, who is the taxable person for all of the transactions performed by those persons; or in such a way that:

b) treatment as a single taxable person must of necessity — and thus, in addition, under sufferance of substantial tax losses — lead to a VAT group separate from the persons closely bound to one another, which constitutes a fictitious entity to be set up specifically for VAT purposes?

2. If the correct answer to the first question is (a): does it follow from the case-law of the Court of Justice of the European Union concerning non-business purposes within the meaning of Article 6(2) 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 (judgment of the Court of Justice of the European Union of 12 February 2009 in *VNLTO* — C-515/07, EU:C:2009:88) that, in the case of a taxable person who,

a) on the one hand, pursues an economic activity and, in so doing, provides services for consideration within the meaning of Article 2(1) 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, and

b) on the other hand, pursues at the same time an activity which is incumbent upon him in the exercise of public authority (an activity he carries on in an official capacity) and in respect of which he is not considered to be a taxable person, in accordance with Article 4(5) 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,

a service falling within the sphere of his economic activity which he provides free of charge for a purpose falling within the sphere of the activity he carries on in an official capacity is not subject to tax, in accordance with Article 6(2)(b) 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?

Provisions of EU law relied on

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, in particular the second subparagraph of Article 4(4) and Article 6(2)

Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 11

Provisions of national law relied on

Umsatzsteuergesetz (Law on Turnover Tax) (UStG), in particular Paragraph 2(2), point 2, and Paragraph 3(9a)

Abgabenordnung (Tax Code) (AO), first sentence of Paragraph 73

Brief presentation of the facts and the procedure

1 The applicant is a foundation governed by public law and the sponsor of a university which operates, inter alia, a school of medicine. It is a taxable person and provides services for consideration (in the form of patient care). At the same time, in its capacity as a legal person governed by public law, it performs tasks in an official capacity (the teaching of students) in respect of which it is not considered to be a taxable person.

2 The applicant is the 'Organträgerin' (tax group parent), within the meaning of Paragraph 2(2), point 2, of the UStG, of U-GmbH. U-GmbH provided, inter alia, cleaning services for the applicant. It provided those services across the complex of buildings comprising the university school of medicine, that is to say both on premises devoted to patient care (patients' rooms, corridors and operating theatres) and thus to be classified as falling within the applicant's economic sphere of activity, in which it operates as a taxable person, and on premises falling within the applicant's official sphere of activity, that is to say premises used for student teaching (lecture rooms and laboratories), for the purposes of which it is not considered to be a taxable person.

3 Following an external audit, the Finanzamt (Tax Office) formed the view that the applicant's operations constituted a single undertaking. In that connection, the Finanzamt regarded the cleaning services which U-GmbH provides within the [applicant's] official sphere of activity as supplies effected within the 'Organschaft' (tax group relationship) that exists between the applicant and U-GmbH. In the opinion of the Finanzamt, the cleaning services form part of a non-business activity and constitute a benefit in kind within the meaning of Paragraph 3(9a), point 2, of the UStG (Article 6(2)(b) of Directive 77/388). On the basis of the proportion of surfaces cleaned for the applicant operating within its official sphere, the Finanzamt calculated the turnover tax due to be higher by EUR 841.12. The objection raised against that calculation was unsuccessful.

4 The Finanzgericht (Finance Court) upheld the action [contesting that objection]. It held that there is in this case an 'Organschaft' (tax group relationship) which leads to the consolidation of the applicant as 'Organträgerin' parent and U-GmbH as 'Organgesellschaft' (subsidiary) into a single undertaking. That tax group

relationship extends to the applicant's official sphere of activity too. The conditions governing the existence of a benefit in kind within the meaning of Paragraph 3(9a), point 2, of the UStG, however, are not met. It is that judgment which the defendant is challenging by the appeal on a point of law which it has brought before the referring court.

Brief presentation of the grounds of the reference

The first question

Statutory rules of national law

5 **Paragraph 2(2), point 2, of the UStG** transposes the second subparagraph of Article 4(4) of Directive 77/388 into national law and provides that a legal person (the 'Organgesellschaft') (tax group subsidiary) which, from the point of view of the financial, economic and organisational relationships that exist between them, is integrated into the undertaking of another person (the 'Organträger') (tax group parent) does not carry on its economic activity independently. In accordance with Paragraph 2(2), point 2, of the UStG, based on the second subparagraph of Article 4(4) of Directive 77/388, transactions between the tax group subsidiary and the tax group parent are regarded as being performed within a single taxable person (third sentence of Paragraph 2(2), point 2, of the UStG). These so-called internal transactions do not fall within the scope of turnover tax. The cleaning services provided by U-GmbH to the applicant in the case at issue constitute such internal transactions. **The first sentence of Paragraph 73 of the AO** provides that the tax group subsidiary is to assume liability for the taxes which are payable by the tax group parent by virtue of the latter's status as taxable person.

Points of uncertainty as to the interpretation of EU law that require clarification

6 The referring court takes the view in principle that the first question referred is to be answered in accordance with option (a). There is some uncertainty as to the correct interpretation of EU law, however, inasmuch as — in the light in particular of the judgment of 17 September 2014, *Skandia America Corp. (USA), filial Sverige* (C-7/13, EU:C:2014:2225, paragraph 28), concerning a 'VAT group' — it falls to be clarified whether the provisions of the Directive allow a Member State to confer the status of taxable person on a member of the VAT group (the 'Organträger' (tax group parent)) rather than on the VAT group ('Organkreis' (group treated as a single entity for tax purposes)). The referring court has already referred a question to the Court of Justice for a preliminary ruling on this point (Case C-141/20).

Wording and purpose of the second subparagraph of Article 4(4) of Directive 77/388

7 The treatment as a single taxable person required by the wording of the second subparagraph of Article 4(4) of Directive 77/388 is achieved through consolidation through one of the persons closely bound to one another. This is borne out by, inter alia, the purpose of simplifying administration that lies behind that provision, as is apparent from the case-law of the Court of Justice (judgment of 25 April 2013, *Commission* v *Sweden*, C-480/10, EU:C:2013:263, paragraph 37). [German] national law simplifies the application of VAT law by providing, in the third sentence of Paragraph 2(2), point 2, of the UStG, for a number of persons to be treated as a single taxable person and by thus concentrating the levying of tax on one of those persons who is a taxable person anyway.

Answer to the first question referred on the basis of option (b)

8 If the first question referred is to be answered on the basis of option (b), there is no '**Organschaft' (tax group relationship)** between the applicant as 'Organträgerin' (tax group parent) and U-GmbH as 'Organgesellschaft' (tax group subsidiary) and the application of Article 6(2)(b) of Directive 77/388 in the case at issue is unnecessary from the outset. In the absence of a tax group relationship, U-GmbH would have to be regarded as an independent taxable person which has provided to the applicant services which are in those circumstances subject to [turnover] tax and in respect of which U-GmbH is the taxable person. [German] national law did not provide for the formation of a **VAT group** for the year at issue; indeed, it has not made any such provision at all to date. Neither can a VAT group of this kind, which assumes liability for the persons closely bound to one another as joint and severally liable debtors, be incorporated into national law by way of an interpretation of Paragraph 2(2), point 2, of the UStG.

9 The answer to the first question is of great significance not only to the case at issue but also to tax revenue in Germany, since, taken together, 'Organträger' (tax group parents) within the meaning of Paragraph 2(2), point 2, of the UStG make tax payments accounting for 10% of total revenue from turnover tax in Germany.

10 An answer to the first question referred on the basis of option (b) would have correspondingly significant fiscal implications, given that, in the present case, **no tax liability would attach either to the 'Organträger' (tax group parent)** — which could challenge its liability to tax under Paragraph 2(2), point 2, of the UStG on the ground that that provision is contrary to EU law, and would then no longer have to pay tax at least on the turnover of the 'Organgesellschaft' (tax group subsidiary) — **or to a VAT group or members of such a group** — since the national legislature has not enacted any rules in this regard and the direct application of EU law, at the cost of a 'fictitious' and thus also, in the absence of any statutory foundation, non-existent entity, is not possible — **or to an 'Organgesellschaft' (tax group subsidiary)** — which, notwithstanding the first

sentence of Paragraph 73 of the AO (since this provides only for liability as an 'Organgesellschaft' (tax group subsidiary), can seek the application of Paragraph 2(2), point 2, of the UStG.

11 The tax losses incurred in this way would arise under the application of Directive 2006/112 too, since Article 11 thereof is essentially the same as the second subparagraph of Article 4(4) of Directive 77/388.

The second question referred

Definition of taxable person

12 An activity carried out by a taxable person in his capacity as a taxable person constitutes an economic activity as described in Article 4(1) of Directive 77/388. Such an activity is characterised by the fact that the taxable person supplies or intends to supply goods or services for consideration within the meaning of Article 2(1) of Directive 77/388 (judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraph 21).

Legal person as a taxable person

13 A legal person can — just like a natural person — carry out activities other than economic ones. The Court of Justice describes these as 'non-economic activities' (judgment of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, C-515/07, EU:C:2009:88 [judgment in '*VNLTO*'], paragraph 35 et seq.). Even a legal person governed by public law — such as the applicant — can be a taxable person in one sphere of activity, while nonetheless at the same time carrying on activities which are incumbent on it in the exercise of public authority (of no relevance from the point of view of competition) (activities it carries on an official capacity) and do not therefore constitute economic activities.

Article 6(2) Of Directive 77/388 and the judgment in VNLTO

14 In the use of goods forming part of the assets of a business, as referred to in point (a), and supplies of services carried out free of charge, as referred to in point (b), Article 6(2) of Directive 77/388 contains two criteria for its application. However, only point (a), in presupposing a right to deduct the input tax paid on the goods used, on top of laying down the condition that the goods or services must be used for specific purposes, is contingent upon a further condition.

15 Where a legal person acquires a mixture of goods both for the purposes of its economic activity as a taxable person and for its 'non-economic activity', including, for example, for non-material purposes, the Court of Justice does not allow that legal person, unlike a sole trader, to deduct input tax in full (see the judgment in *VNLTO*, paragraphs 37 to 39). The Court of Justice considers the criterion for the application of Article 6(2)(a) of Directive 77/388 not to be met in

those circumstances, on the ground that the use [of goods] for 'non-economic activities' does not constitute a use [of goods] for non-business purposes within the meaning of that provision. In the judgment in *VNLTO*, the Court of Justice held that Article 6(2)(a) and Article 17(2) of Directive 77/388 are not applicable to the use of goods and services allocated to the business for the purpose of transactions other than the taxable transactions of the taxable person, as the value added tax due in respect of the acquisition of those goods and services, and relating to such transactions, is not deductible.

16 In the present case, the question arises in this regard as to whether that case-law of the Court of Justice affects only the extent of the input tax deduction or whether it is valid even in the case where Article 6(2)(b) of Directive 77/388 is applied independently and without regard to income tax deduction. The consequence of the latter scenario would be that a 'non-economic' activity could not be regarded as serving 'non-business' purposes in the context of the application of Article 6(2)(b) of Directive 77/388 either and that provision would not be applicable to supplies of services carried out free of charge for the purposes of a non-material activity or one carried on in an official capacity.

Requirement of taxation in accordance with the VAT system

17 Where, for example, a taxable person uses staff engaged to pursue his/her/its economic activity in order to provide services for other purposes, the question arises as to whether the ensuing taxation consequences may be different depending on whether the taxable person is a natural person or a legal person.

18 If the taxable person is a natural person who runs a cleaning business, for example, and uses the staff from his business to provide cleaning services for purposes connected with his private lifestyle in his private home, this leads, in the view of the referring court, to a supply of services carried out free of charge by the taxable person for his own private use within the meaning of Article 6(2)(b) of Directive 77/388.

19 If the taxable person is a legal person which also runs a cleaning business and, in so doing, uses the staff from its business to clean premises used for official purposes, as in the case at issue, the question is whether this situation too — like that in which a sole trader uses goods or services for private purposes — leads to the application of Article 6(2)(b) of Directive 77/388, since the taxable person may in those circumstances be said to be supplying services free of charge for non-business purposes.

20 From the point of view of the VAT system, Article 6(2)(b) of Directive 77/388 could be said to be applicable in both cases. On that basis, the use of goods or services for a 'non-economic activity', such as, potentially, within the official sphere of operation of a legal person governed by public law, would have to be regarded as use for non-business purposes within the meaning of Article 6(2)(b) of Directive 77/388. This, however, might be considered to be contrary to the

judgment in *VNLTO*, although, as has already been noted, that judgment was given in relation to the deduction of input tax, and the question therefore arises as to whether it is also relevant in the context where Article 6(2)(b) of Directive 77/388 is applied independently and without reference to the deduction of input tax.