Case C-333/20

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:

22 July 2020

Referring court:

Curtea de Apel București (Court of Appeal, Bucharest, Romania)

Date of the decision to refer:

30 December 2019

Applicant:

Berlin Chemie A. Menarini SRL

Defendant:

Administrația Fiscală pentru Contribuabili Mijlocii București – Direcția Generală Regională a Finanțelor Publice București

Intervener:

Berlin Chemie AG

Subject matter of the main proceedings

Administrative-law action brought by the applicant Berlin Chemie A. Menarini SRL, a commercial company based in Romania, supported by the intervener Berlin Chemie AG, a commercial company based in Germany, before the Curtea de Apel București (Court of Appeal, Bucharest, Romania) seeking, first, the annulment of the notice of assessment issued by the defendant Administrația Fiscală pentru Contribuabili Mijlocii București – Direcția Generală Regională a Finanțelor Publice București (Bucharest Tax Authority for Medium-sized Taxpayers – Bucharest Regional Directorate-General of Public Finances), whereby the applicant was ordered to pay RON 42 461 424 in additional value added tax (VAT), RON 5 855 738 in interest, and RON 3 289 071 as a late-payment penalty and, second, the reimbursement of amounts already paid under that notice of assessment

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

Interpretation of the second sentence of Article 44 of Directive 2006/112 and Article 11 of Implementing Regulation No 282/2011

Questions referred

1. If a company that carries out supplies of goods in the territory of a Member State other than that in which it has established its business is to be regarded as having, within the meaning of the second sentence of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 11 of Council Regulation No 282/2011, a fixed establishment in the State in which it carries out those supplies, is it necessary for the human and technical resources employed by that company in the territory of that Member State to belong to it, or is it sufficient for that company to have immediate and permanent access to such human and technical resources through another affiliated company which it controls since it holds the majority of its shares?

2. If a company that carries out supplies of goods in the territory of a Member State other than that in which it has established its business is to be regarded as having, within the meaning of the second sentence of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 11 of Council Regulation No 282/2011, a fixed establishment in the State in which it carries out those supplies, is it necessary for the presumed fixed establishment to be directly involved in decisions relating to the supply of the goods, or is it sufficient for that company to have, in the State in which it carries out the supply of goods, technical and human resources that are made available to it through contracts concluded with third party companies for marketing, regulatory, advertising, storage and representation activities which are capable of having a direct influence on the volume of sales?

3. On a proper construction of the second sentence of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 11 of Council Regulation No 282/2011, does the possibility for a taxable person to have immediate and permanent access to the technical and human resources of another affiliated taxable person controlled by it preclude that affiliated company from being regarded as a service provider for the fixed establishment thus created?

Provisions of EU law cited

Second sentence of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Articles 10 and 11 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

Provisions of national law cited

Article 133(2) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), in force until 31 December 2015, according to which 'the place of supply of services rendered to a taxable person acting as such shall be the place where the customer has established his business. 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 the fixed establishment of the customer is located. In the absence of such a place of business or fixed establishment, the place of supply of services shall be the place where the taxable person to whom the services in question are supplied has his permanent address or usually resides', and Article 125^1(2)(b) of that law, according to which 'a taxable person who has established his place of business outside Romania shall be deemed to be established in Romania if he has a fixed establishment in Romania, that is to say, if he has sufficient technical and human resources in Romania to carry out regular supplies of taxable goods and/or services'

Since 1 January 2016, those provisions have been, with the same content, set out in Article 278(2) and Article 266(2), respectively, of Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code).

Succinct presentation of the facts and the main proceedings

1 The intervener Berlin Chemie AG is a company based in Germany which has been marketing pharmaceutical products in Romania continually since 1996. It has a tax representative in Romania and is registered in Romania for VAT purposes and as a payer of clawback tax. The products marketed by the intervener have been granted marketing authorisations in Romania.

2 In 2007, the intervener concluded a contract with the Romanian commercial company Fildas Trading SRL for the storage of its products. Under the terms of that contract, Berlin Chemie AG supplies Fildas Trading SRL with products at list price to ensure that those products are permanently in stock in Romania. Fildas Trading SRL has a corresponding obligation to hold the intervener's products in storage, keeping them separate from the products of other companies, to maintain detailed accounts of the products, recording goods in and out, as well as an inventory of the products based on their expiry date, to allow the intervener to perform inspections and to make the products available to third-party buyers, while being able to remove products from storage, in its own name, for the purpose of reselling them.

3 In 2011, the applicant Berlin Chemie A. Menarini SRL was incorporated in Bucharest. Its sole shareholder is Berlin Chemie/Menarini Pharma GmbH, established in Germany, which in turn is 95% owned by the intervener Berlin Chemie AG. According to the memorandum of association, the Romanian company's main business sector is management consulting and its main business activity is public relations and communications consulting. In addition, the company may engage in secondary activities such as the wholesale of pharmaceutical products, business and management consulting, advertising agency activities, market research, and opinion polls.

4 On 1 June 2011, the intervener and the applicant concluded a 'Marketing, advertising and regulatory services contract', governed by German law. Under the terms of the contract, the Romanian company agreed to do all the marketing required to actively promote the intervener's products in Romania with a view to increasing demand in Romania for those products, in accordance with the strategies and budget established and developed by the intervener. The Romanian company also agreed to set up and run a qualified legal advisory service to deal with advertising, information and promotional issues, on behalf of and in the interest of the intervener, assuming, on a continuous and permanent basis, local responsibility for compliance with all national laws and the intervener's internal procedures on advertising, promotion and other related issues and situations.

5 The applicant further agreed to take all regulatory action needed to obtain the necessary authorisations for the intervener to distribute the products in Romania, including: mediating to obtain all the necessary registrations, certificates and other administrative permits; monitoring cases of unfair competition, patent infringements and other events with an adverse impact on the business; and providing assistance with clinical trials and other research and development activities.

6 Under the same contract, the applicant agreed to provide an adequate supply of medical literature and promotional material approved by the intervener for use by pharmaceutical representatives in promoting the products, while the intervener agreed to provide the applicant with free product samples, in relation to the applicant's promotion of the products, to be distributed to local healthcare professionals on the intervener's behalf.

7 The contract also stipulated that the intervener Berlin Chemie AG had a right to inspect the records and premises of the Romanian company.

8 In return for the services provided by the Romanian company, payment of a monthly fee was agreed, calculated on the basis of the total expenses actually incurred by the Romanian company, plus 7.5% per annum.

9 Since 14 March 2013, payments and transactions between the applicant and the intervener have taken place on the basis of a 'zero balance contract', or an 'effective cross-border cash pooling contract', under which the principal account

belongs to the intervener, and the principal bank is UniCredit Bank AG (Germany). The applicant's account is a 'participant' or 'peripheral' account and the bank with which it is held, UniCredit Țiriac Bank (Romania), is the participating bank.

10 In practice, the services provided by the applicant to the intervener are paid for by means of netting agreements between the service invoices issued by the applicant to the German company and the interest-bearing loan granted by the latter to the Romanian company, the invoices and loan both having the same value. A copy of the netting agreement was sent to Banca Națională a României (National Bank of Romania).

11 According to the information supplied by the Oficiul Național al Registrului Comerțului (National Trade Register Office, Romania), in 2016 the applicant had an average of 201 employees, 151 of whom were sales representatives.

12 The applicant provided the intervener with the marketing, regulatory and advertising services mentioned in the contract, deeming those services to be taxable not in Romania, but in Germany, and consequently issuing invoices with a zero rate of VAT.

13 Considering the intervener Berlin Chemie AG to have sufficient technical and human resources in Romania to have a fixed establishment there at the applicant's place of business in Bucharest, the defendant considered the product marketing, promotion and authorisation services supplied by the applicant to the intervener during the period from 1 February 2014 to 31 December 2016 to be taxable in Romania, calculated an additional basis of assessment of RON 183 763 182 and issued a notice of assessment dated 29 November 2017, which imposed further payment obligations on the applicant corresponding to VAT, interest and a late-payment penalty.

14 The applicant brought an administrative-law action before the referring court, Curtea de Apel București (Court of Appeal, Bucharest), seeking the annulment of that notice of assessment and the reimbursement of amounts already paid under that notice. Berlin Chemie AG filed an application for leave to intervene in support of the applicant, arguing that, in so far as it finds that it has a fixed establishment in Romania, the notice of assessment at issue directly affects the tax treatment of transactions between it and the applicant. That application was granted by the referring court.

Principal arguments of the parties to the main proceedings

15 The defendant considered the conditions laid down in Article 125^1(2)(b) of Law No 571/2003 and Article 266(2) of Law No 227/2015, in conjunction with Regulation No 282/2011, to have been satisfied, and therefore considered the intervener to have sufficient technical and human resources in Romania to have a fixed establishment in Romania at the address of the applicant's place of business.

In addition, under Article 133(2) of Law No 571/2003 and Article 278(2) of Law No 227/2015, the place of supply of services is the place where the fixed establishment of the customer is located, namely Romania.

16 To arrive at those conclusions, the defendant relied on various circumstances, including the fact that the intervener is the applicant's sole customer. Moreover, since the applicant agreed to provide the German company with marketing services under the 2011 contract and since, according to its organisation chart, the applicant has 151 sales representatives among its employees, it follows that the main tasks performed by the applicant's employees are intended to increase/obtain orders for pharmaceutical products marketed by the intervener Berlin Chemie AG.

17 The defendant considered the German company to have access to technical resources in Romania, and specifically the applicant's technical resources (computers, operating systems, vehicles), which were purchased with funds from the German company. However, the applicant has argued that those resources belong to it and that it is irrelevant whether they were purchased using funds provided by the German company and on which it pays interest.

18 The defendant tax authority noted that the tasks carried out by the applicant's employees also include receiving and forwarding orders for pharmaceutical products from Romania's wholesale distributors to the intervener, as well as processing invoices and forwarding them from the intervener to its customers. In addition, the applicant's employees maintain a relationship with Fildas, custodian of the products marketed by the intervening German company. The applicant submits that the decision concerning the supply of the pharmaceutical products is taken by the German company. It claims that it only carries out support and administrative activities, which are intended to facilitate communication and overcome language barriers, and that its employees do not have the power to bind the German company. Furthermore, although it receives orders from distributors addressed to the intervener and invoices from the intervener addressed to distributors, the applicant considers this a secretarial/accounting activity which is irrelevant for the purpose of creating a fixed establishment. It argues that the use of a postal address would not be sufficient for that purpose either.

19 Other circumstances that the defendant regards as relevant for the purpose of creating a fixed establishment are the fact that the applicant provided the intervener with regulatory services for the pharmaceutical products sold by the intervener on the Romanian market and that one of the applicant's employees was appointed by the intervener to handle pharmacovigilance matters. Those circumstances are also not considered by the applicant to be sufficient to create a fixed establishment, given that the former may be carried out by any other company.

20 The defendant further noted that the members of the inventory committees for the products marketed by the intervener and held in Fildas' warehouses were the applicant's employees. However, the applicant argues that its employees were

simply performing an administrative task consisting of facilitating communication, since the Fildas employees in that warehouse did not speak English. In addition, the inventory was taken in the presence of one of the intervener's employees, who had travelled from Germany to Romania specifically for that purpose.

21 The defendant also noted that the applicant decided to destroy certain medicines, whereas the applicant has claimed that it destroyed only its own samples and not products belonging to the intervener and held in storage in Romania.

22 In addition, according to the defendant, the applicant agreed to provide advertising and merchandising services to promote the products marketed by the intervener on the Romanian market. To that end, the applicant organised and attended promotional events for the intervener's pharmaceutical products, where it distributed samples of those products to healthcare professionals. The applicant is a local representative of holders of marketing authorisations for products marketed in Romania by the intervener Berlin Chemie AG.

23 Lastly, the tax authority noted that the applicant's tax records are organised into cost centres for the 25 products marketed by the intervener in Romania, which are transposed into the accounts, and that the applicant is an active member of the Asociația Română a Producătorilor Internaționali de Medicamente (Romanian Association of International Medicine Manufacturers), despite not manufacturing or marketing medicines on Romanian territory. Those circumstances are also considered irrelevant by the applicant, who, on the one hand, justifies the organisation of its tax records by the existence of a budget for the promotion of each product and by compliance with international accounting standards and, on the other, states that engaging in any activity in the pharmaceutical sector is sufficient to be a member of that association.

Succinct presentation of the reasons for the reference

24 The referring court notes that, since it is called on to determine the place of taxation of the marketing, advertising and regulatory services provided by the applicant to the intervener and to verify whether the intervening German company has a fixed establishment in Romania, the outcome of the main proceedings depends on the interpretation of the second sentence of Article 44 of Directive 2006/112 and Article 11 of Regulation No 282/2011.

25 As regards the relevant national provisions, which make the existence of a fixed establishment in Romania contingent on the availability in that country of sufficient technical and human resources to carry out regular supplies of taxable goods and/or services, the referring court notes that they have a relatively different wording from that of Article 11 of Regulation No 282/2011, according to which 'fixed establishment' means any establishment, other than the place of establishment of a business referred to in Article 10 of that 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.

26 The referring court identifies a series of judgments of the Court of Justice, namely *Welmory* (C-605/12), *Commissioners of Customs and Excise* v *DFDS* (C-260/95), *Daimler and Widex* (C-318/11 and C-319/11), *TGE Gas Engineering* (C-16/17), *ARO Lease* v *Inspecteur der Belastingdienst Grote Ondernemingen te Amsterdam* (C-190/95), *RAL (Channel Islands) and Others* (C-452/03), *WebMindLicenses* (C-419/14), *Faaborg-Gelting Linien* v *Finanzamt Flensburg* (C-231/94), *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* (C-168/84), *E.ON Global Commodities* (C-323/12), *Planzer Luxembourg* (C-73/06) and *FCE Bank* (C-210/04). However, these concern different factual and legal situations from those in the present case, which is why the referring court has doubts regarding the interpretation to be given to the second sentence of Article 44 of Directive 2006/112 and Article 11 of Regulation No 282/2011.

27 Moreover, the previous case-law of the Court of Justice does not seem to address the relevance of the provision of marketing services for the purpose of creating a fixed establishment, given that such marketing services presuppose the performance of complex activities which are quite closely linked to the sale of goods, since they are capable of influencing the performance of the business.

28 As regards the first question, the referring court finds that, although the tax authority considered the intervener Berlin Chemie AG to have a fixed establishment in Romania, in view of the human and technical resources available to the applicant, a Romanian company controlled by the intervener and with which the latter has concluded a contract under which it is provided with exclusive marketing, advertising and regulatory services closely linked to the longstanding and continued business it carries out in Romania, those human and technical resources belong, at least formally, to the Romanian company, which appears to have been set up precisely to provide the abovementioned services.

29 Moreover, since the applicant has no other customers, the intervener's access to its resources appears to be immediate and permanent.

30 Accordingly, the referring court asks whether the situation described means that the intervener has a fixed establishment in Romania, or whether it is necessary for the human and technical resources in question to belong to it directly. If a person can transfer the taxation of services from one Member State to another simply by covering its need for human and technical resources through contracts concluded with companies set up specifically for the purpose of providing such services, which are necessary to carry on the business in the second Member State, this could lead to abuse.

31 Since the applicant is not a subsidiary of the German company, the situation in the present case differs from the one that gave rise to the judgment of the Court in

Commissioners of Customs and Excise v *DFDS* (C-260/95), which specifically concerned travel agents.

32 The situation is also different from the one that gave rise to the judgment in *Welmory* (C-605/12), in which the companies were independent, whereas, in the present case, the intervener controls the applicant and benefits exclusively from its resources.

33 As regards the second question and the applicant's assertion that the services provided are simply administrative and support services of no relevance for the purposes of the second sentence of Article 44 of Directive 2006/112 and Article 11 of Regulation No 282/2011, the referring court notes that the situation in the present case differs from the one that gave rise to the judgments of the Court of Justice in *ARO Lease* v *Inspecteur der Belastingdienst Grote Ondernemingen te Amsterdam* (C-190/95), *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* (C-168/84), *Welmory* (C-605/12) and *Planzer Luxembourg* (C-73/06).

34 The referring court states that it has doubts as to whether the marketing services provided by the applicant, which cannot be confused with advertising services, can be regarded as simple administrative and support activities, since those services seem to be intrinsically linked to the business carried out by the German company in Romania, namely the sale of pharmaceutical products, and appear to have a direct influence on the supply of those products in Romania.

35 Even if the applicant's employees themselves do not make the decision as such to sell the intervener's pharmaceutical products in Romania, the applicant's organisation chart nevertheless includes 150 'Sales Representatives' and a 'Sales Manager', which shows that their work is closely linked to obtaining orders for the intervener's products. The applicant's employees are also involved in forwarding orders from customers to the intervener, so their work specifically concerns the sale of pharmaceutical products.

36 As regards the third question, the referring court notes that the applicant's defence is based on the argument that the applicant and the intervener are separate legal entities, and not one and the same entity from a business point of view, and on the irrelevance of the circumstances used by the defendant to prove that the intervener has a fixed establishment in Romania.

37 Although the applicant was not set up as a subsidiary or branch of the German company, the referring court, in view of the control exercised by the intervener over the share capital, the link between the applicant's business and the sale of the intervener's products, the exclusive nature of the services provided by the applicant, and the intervener's right to inspect the applicant's records and premises, is uncertain as to whether those two companies can be regarded as a single legal entity.

38 The situation in the present case differs from the one that gave rise to the abovementioned judgments of the Court in that the applicant is not a subsidiary or branch of the intervener, but neither is it independent of the intervener.

39 The referring court is therefore uncertain as to whether the same legal entity can simultaneously represent the fixed establishment of another legal entity while also acting as a service provider for the fixed establishment thus created.