Case C-737/19

Request for a preliminary ruling

Date lodged:

7 October 2019

Referring court:

tribunal administratrif de Montreuil (France)

Date of the decision to refer:

27 September 2019

Applicant:

Bank of China Limited

Defendant:

Ministre de l'Action and des Comptes publics

[...]

Having regard to the procedure [...]:

[...] Bank of China Limited, [...] claims that the tribunal administratrif de Montreuil (France) (Administrative Court, Montreuil, France) should:

(1) declare that it is not liable for the additional value added tax assessments imposed on it for the period from 1 January 2012 to 30 April 2014, or the corresponding default interest, totalling EUR 947 033, and order the recovery of the sums paid in that respect;

[...]

It submits that:

– the value added tax (VAT) invoiced to its French branch for the purposes of the transactions carried out by its principal establishment in China is fully deductible pursuant to Article 271(V)(b) of the code général des impôts (General Tax Code), as those transactions, which are 'internal' because the branch and the principal establishment form a single legal entity, fall outside the scope of VAT; that analysis is confirmed by the judgment of 24 January

2019, *Morgan Stanley & Co International* **[Or. 2]** (C-165/17, EU:C:2019:58), which must be applied to it as its branch is established in France;

– the reference to the judgment of 12 September 2013, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541) is not relevant for the purpose of determining its deduction rights, since that decision does not exclude the VAT on expenditure used for the purposes of supporting its principal establishment from a branch's right to deduct; the defendant took a position at odds with that decision by including the amounts received from the principal establishment by the branch in the calculation of that branch's right to deduct;

– [...] [plea based on national law]

– [...] [plea based on Article 49 TFEU]

– [...] [plea based on the Franco-Chinese tax treaty]

[...]**[Or. 3]**

[...] [procedure and texts referred to, including Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1)]

1. The Paris branch of Bank of China Limited, a company incorporated under Chinese law, was the subject of an audit of accounts, following which the defendant served on it additional value added tax assessments for the period from 1 January 2012 to 30 April 2014. The auditors called into question the deduction of input VAT on the expenditure incurred by the branch which was used for the purpose of carrying out loan transactions for the benefit of its Chinese principal establishment and other branches pursuant to Articles 256, 259 and 271 of the General Tax Code and Articles 205 and 206 of Annex II to that code. Enforcement of the additional assessments was sought by notice of 29 February 2016. By decision of 28 February 2017, the defendant authority dismissed the company's objection of 22 December 2016.

<u>The value in dispute:</u>

2. [...] the sum claimed, including default interest, amounts to EUR 901 394. [...].

<u>Form of order seeking a declaration that Bank of China is not liable for the sum claimed:</u>

*[...]***[Or. 4]***[...]*

As regards the other pleas in the application:

6. According to Article 168 of Directive 2006/112/EC of 28 November 2006: *'In so far as the goods and services are used for the purposes of the taxed*

transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay: (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person ...'. Under Article 169 of that directive: 'In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following: (a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State (...) (c) transactions which are exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community.'

7. By judgment of 24 January 2019, *Morgan Stanley & Co International* (C-165/17, EU:C:2019:58), *the Court of Justice of the European Union held, first, that 'Article 17(2), (3) and (5) and Article 19(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 — Common system of value added tax: uniform basis of assessment, and Articles 168, 169 and 173 to 175 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in relation to the expenditure borne by a branch registered in a Member State, which is used, exclusively, both for transactions subject to value added tax and for transactions exempt from that tax, carried out by the principal establishment of that branch established in another Member State, it is necessary to apply a deductible proportion resulting from a fraction the denominator of which is formed by the turnover, exclusive of value added tax, made up of those transactions alone, and the numerator of which is formed by the taxed transactions in respect of which value added tax which would also be deductible if they had been carried out in the Member State in which that branch is registered, including where that right to deduct stems from the exercise of an option, effected by that branch, consisting in making the transactions carried out in that State subject to value added tax.' Second, the Court also held that 'Article 17(2), (3) and (5) and Article 19(1) of Sixth Directive 77/388, and Articles 168, 169 and 173 to 175 of Directive 2006/112 must be interpreted as meaning that, in order to determine the deductible proportion applicable to the general costs of a branch* ***[Or. 5]*** *registered in a Member State, which are used for both transactions of that branch in that State and transactions of the principal establishment of that branch established in another Member State, account must be taken, in the denominator of the fraction which makes up that deductible proportion, of the transactions carried out by both that branch and that principal establishment, it being specified that it is necessary that, in the numerator of that fraction, besides the taxed transactions carried out by that branch, solely the taxed transactions carried out by that principal establishment must appear, in respect of which value added tax would also be deductible if they had been carried out in the State in which the branch concerned is registered.'*

8. In the first place, [...] Bank of China Limited submits [...] that that judgment applies to its situation. [...] the defendant asserts that the rules laid down by the Court of Justice do not allow the deduction of value added tax claimed by a branch in a Member State of the European Union in respect of expenditure incurred in that State in connection with transactions carried out by its principal establishment in a State that is not a Member State of the European Union, in the present case China. It does not follow from that judgment that the intention of the Court, which was not questioned on that point, was to regulate the relationship between a branch established in a Member State and its principal establishment established in a third country. That question gives rise to a significant difficulty, in particular in the light of the difference between instruments for administrative cooperation between the Member States and those between the Member States and third countries and in the light of the neutrality principle. Therefore, the question is whether the solutions identified in the judgment of 24 January 2019, *Morgan Stanley & Co International* (C-165/17, EU:C:2019:58), referred to in the preceding paragraph, are applicable where, on the one hand, a branch carries out, in a Member State, transactions subject to value added tax, and, on the other, supplies services for the benefit of its principal establishment and branches established in a third country.

9. In the second place, [...] it is common ground between the parties that the branch and the principal establishment form one and the same legal entity. Where the branch established in a Member State claims a right to deduct based on the expenditure incurred by it in order to supply services for the benefit of its principal establishment in a third country, that is exports of financial and banking services, the question arises as to whether the taxable person may deduct value added tax pursuant to Article 169(a) or Article 169(c).

10. In the third place, if the first question is answered in the affirmative and the branch may claim a deduction pursuant to Article 169(a), it is necessary to determine under what conditions the banking transactions carried out by the principal establishment established in a third country may be regarded as giving rise to a right to deduct if they had been carried out in the Member State where the expenditure subject to value added tax is incurred. If the first question is answered in the affirmative and the branch may claim a deduction pursuant to Article 169(c), the question is to determine under what conditions the recipient of the services may be regarded as being established outside the European Union where the branch is in the European Union and forms part of one and the same legal entity as its principal establishment.

11. Those questions raise significant difficulties of interpretation, which should be referred to the Court of Justice of the European Union before a decision is given on the application lodged by Bank of China Limited. **[Or. 6]**

HAS DECIDED AS FOLLOWS:

[...] The proceedings relating to the application lodged by Bank of China Limited are stayed, pending a ruling from the Court of Justice of the European Union on the following questions:

1. Are the solutions adopted in the judgment of 24 January 2019, *Morgan Stanley & Co International plc* v *Ministre de l'Économie et des Finances* (C-165/17) applicable where a branch, on the one hand, carries out, in a Member State, transactions subject to VAT, and, on the other, supplies services for the benefit of its principal establishment and branches established in a third country?

2. Where a branch established in a Member State claims a right to deduct based on the expenditure incurred by it in connection with the supply of services for the benefit of its principal establishment in a third-country, that is exports of financial and banking services, may the taxable person deduct value added tax pursuant to Article 169(a) or Article 169(c) [of Directive 2006/112]?

3. If the first question is answered in the affirmative and the branch may claim a deduction pursuant to Article 169(a), under what conditions may banking transactions carried out by the principal establishment established in a third country be regarded as giving rise to a right to deduct if they had been carried out in the Member State the expenditure subject to value added tax is incurred? If the first question is answered in the affirmative and the branch may claim a deduction pursuant to Article 169(c), under what conditions may the recipient of the services be regarded as being established outside the European Union where the branch is located in the European Union and forms part of one and the same legal entity as its principal establishment?

[...]**[Or. 7]**[...][signatures]