Case C-267/21

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:

23 April 2021

Referring court:

Înalta Curte de Casație și Justiție (Supreme Court of Cassation and Justice, Romania)

Date of the decision to refer:

25 March 2021

Appellant:

Uniqa Asigurări SA

Respondents:

Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor (National Agency for Tax Administration – Directorate-General for the settlement of complaints)

Direcția Generală de Administrare a Marilor Contribuabili (Directorate-General for large-scale taxpayers)

Subject matter of the main proceedings

Appeal against the civil judgment of the Curtea de Apel București (Court of Appeal, Bucharest, Romania) of 19 June 2018 partially dismissing the appellant's application for annulment of the decision on the settlement of the complaint of 24 March 2016 and the notice of assessment of 30 December 2015 adopted, in relation to value added tax (VAT), by the tax authorities

Subject matter and legal basis of the request

An interpretation of Article 59 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax is sought pursuant to Article 267 TFEU.

Question referred for a preliminary ruling

In interpreting Article 59 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, can claims settlement services supplied by correspondent companies for an insurance company, in the name and on behalf of the latter, be classified in the category of services supplied by consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information?

Provisions of EU law and EU case-law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Articles 46 and 59

Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive), recitals 8 to 15, Article 4(1), (4) and (8)

Internal Regulations of the Council of Bureaux appended to Commission Decision 2003/564/EC of 28 July 2003 on the application of Council Directive 72/166/EEC relating to checks on insurance against civil liability in respect of the use of motor vehicles

Judgments of the Court of Justice of 6 March 1997, C-167/95, *Linthorst, Pouwels en Scheres* v *Inspecteur der Belastingdienst/Ondernemingen Roermond*; of 16 September 1997, C-145/96, *von Hoffmann* v *Finanzamt Trier*; of 25 January 2001, C-429/97, *Commission* v *France*; of 6 December 2007, C-401/06, *Commission* v *Germany*; of 7 October 2010, C-222/09, *Kronospan Mielec*; and of 17 March 2016, C-40/15, *Aspiro*

Provisions of national law relied on

Legea 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), in the version in force in 2009, applicable to the transactions in question:

Article 133

‘(1) The place of supply of the services shall be deemed to be the place where the supplier is established or has an establishment from which the services are supplied.

(2) By way of derogation from paragraph (1), with regard to the following services the place of supply of the services shall be deemed to be:

…

(g) the place where the customer to whom the services are supplied is established or has an establishment, provided that the customer concerned is established or has an establishment outside the Community or is a taxable person acting as such, established or having an establishment within the Community, but not in the same State as the supplier, in the case of the following services:

…

5. services supplied by consultants, engineers, lawyers, accountants and accounting experts, consultancy firms and other similar services;

…’.

Succinct presentation of the facts and procedure in the main proceedings

1 SC Uniqa Asigurări SA (also ‘the company’) offers its customers compulsory third-party insurance policies, including Green Card coverage; this coverage is valid for accidents which occur outside the territory of Romania in the countries which form part of the Green Card system (in respect of countries both inside and outside the European Union). Green Card coverage forms part of third-party motor insurance, under which compensation is granted for the amounts which the insured person is required to pay for the destruction of property or personal injury caused by traffic accidents which occurred abroad. The company also grants compensation for any expenses incurred by the insured/injured person in civil proceedings.

2 Therefore, in the event of an accident outside Romania, Uniqa, in its capacity as insurer, granted its customers compensation under Green Card coverage, from 2007 to 2009, through a correspondent Uniqa company in the country concerned, as follows:

– its customer submitted a claim for compensation to the correspondent company in the country in which the accident occurred;

– the correspondent company settled the claim for compensation in the country in which the accident occurred, performing a series of multiple activities involving various aspects/actions, such as:

(i) notification/opening of a damages case – by submitting/initiating a claim for compensation;

(ii) research into the causes and circumstances of the accident – verification of the validity of the policy, ascertainment of the damage, valuation of the damage and conduct of the investigation, proposal of repair/replacement solutions;

(iii) assessment of the value of the compensation – verification of the estimate, and so on;

(iv) compensation for carrying out repairs – billing the garage, payment of compensation, and so on;

(v) examination of claims for damages – post-compensation analysis; claims for damages may offset part of the insurance compensation paid.

3 The actions taken when initiating a claim for compensation in the Green Card system are set out and governed by the Internal Regulations of the Council of Bureaux, under which the correspondent company designated to handle and settle the claim for compensation must conduct an investigation into all the circumstances of the accident. That investigation is to follow the abovementioned stages (i) to (v).

4 Therefore, Uniqa concluded partnership agreements with 26 companies outside Romania, 21 of which are insurance companies, the rest being companies of a different type, which form part of the national bureaux of motor insurers, which handle the compensation schemes and deal with the identification of the correspondent companies which can settle the claims for compensation appropriately.

5 Under the bilateral agreements concluded between Uniqa and the correspondent companies (Article 2 of the bilateral agreements), as regards the handling and settlement of the claim for compensation, the correspondent company is authorised by Uniqa and is required to act in the name of, on behalf of and in the interest of the company – in terms of protecting the insurer's assets and for the purpose of closing the damages case, whilst at the same time acting in accordance with the legislation of the country in which the accident occurred. In that regard:

– in respect of damage to property, up to the amount of EUR 15 000, caused by the accident, under Article 3.5 of the agreements, the correspondent companies are free to approve or refuse, remaining liable to both policyholders and Uniqa for the reason and the amount of payments made in settling the claims;

– in respect of damage to property exceeding EUR 15 000, the correspondent companies are required to cooperate with Uniqa for the purpose of settling a claim for compensation, having regard to the relevant impact on the company's assets;

claims are to be settled in accordance with the legislation of the country in which the accident occurred.

6 Uniqa paid handling fees to the correspondent companies for the handling services supplied by them to the company's customers in respect of claims for compensation, and applied the following tax treatment:

- in respect of the amounts constituting compensation and services relating to accidents which occurred abroad, invoiced by Uniqa to the correspondent companies, the company did not calculate VAT since those amounts did not form part of the taxable amount for VAT purposes under Article 137(3)(e) of the Tax Code in force between 2007 and 2011;

- in respect of the amounts constituting the handling fees invoiced by the correspondent companies in the form of commission to Uniqa for handling services in respect of claims for compensation, the company did not bear the VAT via the reverse charge mechanism, since those services did not fall within the scope of VAT in Romania under Article 133(1) of the Tax Code in force between 2007 and 2009.

7 The insurance company Uniqa also offers its customers health insurance policies for travel abroad. In this regard, on 1 April 2004 a cooperation contract was concluded between Coris International, Unita Insurance (now Uniqa Asigurări SA) and Coris Roumanie, concerning the handling by Coris International, in the name of and on behalf of Uniqa, of claims for compensation submitted by holders of health insurance policies for travel abroad which Uniqa had taken out for its customers, in terms of providing all the organisational, technical and legal services for the administration and settlement of those claims.

8 Under Article 5 of the cooperation contract, Coris International undertakes to carry out the following activities for the settlement of claims for compensation:

– ensuring that insured persons have access to assistance 24 hours a day;

– determining the amount of the damages and ensuring payment thereof;

– informing Uniqa about the events which occurred, the circumstances in which they occurred, the diagnosis and cost of medical treatment, and any other costs;

– providing technical, organisational and legal assistance for insured persons.

9 On 16 April 2007, the parties to the cooperation contract adopted additional clause No 1, stipulating that, in consideration for the services supplied by Coris International, Uniqa was required to pay the following amounts:

– 9% of the gross premiums written (that is to say, handling fees) – for the examination and investigation of claims and the provision of continuous assistance by Coris agents – to Coris International;

– 91% of the gross premiums written (hospitalisation costs, consultation costs, airline tickets, and so on) (that is to say, costs relating to compensation) – to Coris Roumanie.

10 In invoicing the costs relating to compensation, the company did not calculate the VAT, considering that those costs did not form part of the taxable amount for VAT purposes under Article 137(3)(e) of the Tax Code in force between 2007 and 2011. In respect of the handling fees paid during the period from 2007 to 2009, the company did not bear the VAT via the reverse charge mechanism, since those services did not fall within the scope of VAT in Romania under Article 133(1) of the Tax Code.

11 From 13 March 2012 to 18 December 2015, the tax authorities carried out a tax inspection at the headquarters of Uniqa Asigurări SA to establish, by random spot checks, whether the obligation to calculate, declare and pay certain tax charges between 1 January 2007 and 31 December 2011 had been fulfilled. Following the tax inspection, on 30 December 2015 the supervisory authorities issued a tax inspection report and a notice of assessment which required the company to pay additional VAT in a total amount of 3 439 412 Romanian lei (RON) and incidental charges in a total amount of RON 3 706 077 by way of handling fees.

12 On 24 March 2016, the company lodged a tax complaint seeking annulment of the tax documents relating to the abovementioned additional tax charges, which was rejected by the decision on the settlement of the complaint of 15 September 2016.

13 On 23 December 2016, Uniqa Asigurări SA brought an action before the Curtea de Apel București (Court of Appeal, Bucharest), seeking annulment of the decision on the settlement of the complaint of 15 September 2016 and annulment of the notice of assessment of 30 December 2015, and a declaration that the tax inspection report issued on the same date was unlawful.

14 The Curtea de Apel București (Court of Appeal, Bucharest) gave a civil judgment on 19 June 2018 by which it only partially granted the application initiating legal proceedings, annulling the notice of assessment only in respect of some of the incidental tax charges, finding that the appellant company had suffered injury as a result of the unjustifiably excessive duration of the tax inspection. That court held that handling and settlement services in respect of claims for compensation ‘are similar to those supplied by engineers’, with reference to Case C-222/09, *Kronospan Mielec*.

15 Both the appellant and the tax authorities concerned appealed that decision before the referring court. The appellant criticised certain aspects relating to the determination of VAT on the handling fees applied to certain transactions which,

in its view, cannot be taxed in the territory of Romania, whereas the tax authorities appealed the decision partially annulling the incidental charges.

Essential arguments of the parties in the main proceedings

16 For the purposes of determining the taxation, the tax authorities deemed applicable in the present case Article 133 of the Tax Code, which governs the place of supply of the services between 2007 and 2009, considering that an accident constituted an exception as provided for in Article 133(2)(g)(5) of the Tax Code, and not the rule invoked by the company, considering that, as regards investigation services in respect of damages cases, the place of supply of the services is in the Member State in which the recipient is established, that is to say, Romania.

17 In support of the classification of the services supplied by the correspondent companies and Coris International in the category of 'other similar services', the tax authorities invoked Notice 741 issued by the British Government, which states that it also covers the services of loss adjusters/assessors, which include the examination of property to establish the extent of the damage as well as the negotiation of a settlement amount. Therefore, the tax authorities conclude that, since the handling and settlement activities performed by the correspondent companies and Coris International for Uniqa in respect of claims for compensation correspond to what the British designate as 'services of loss adjusters', those services fall within the category of 'other similar services' and the place of supply of those services is Romania.

18 In support of its allegations of unlawfulness, the appellant claimed that the services supplied by its correspondents do not fall under 'other similar services' to which the exception introduced by Article 133(2)(g)(5) of the Tax Code refers, and that, on that basis, the rule laid down in Article 133(1) of the Tax Code must apply, since the place of supply of the services is abroad and not in Romania, contrary to the incorrect position taken by the tax authorities which led to the unlawful collection of VAT for those services.

19 The appellant also considers that the reasoning of the tax authorities is incorrect in that the services supplied by its correspondents are of a much more complex nature than the examination of property for the purpose of establishing the damage and the negotiation of a settlement amount. The services supplied by the correspondent companies and Coris International are therefore not limited to a simple examination of the accident and an evaluation of the damage – the rather specific activity of a loss adjuster – but involve the supply of an integrated range of services which starts with the opening of the damages case and, in certain cases, can end with payment of the amount of the damage.

20 Therefore, even if the damage examination and evaluation services to which the tax authorities refer are included in the services supplied by the correspondents of the company, those services represent only part of the overall activity of the

correspondent companies or Coris International, and therefore it would be simplistic, and thus unlawful, to treat them in the same way as damage inspection services.

21 Therefore, the services acquired by the company from its correspondents cannot be classified in the category of similar services supplied by consultants/lawyers/engineers, or even loss adjusters, since they are genuine handling and settlement services in respect of claims for compensation which do not fall within the model envisaged by the legislature for applying the exception relating to the place of supply of services.

Succinct presentation of the reasons for the reference

22 In the appeal proceedings brought by the company, it is for the court seised to rule on the legal nature of the claims settlement services supplied by the correspondent companies for an insurance company. The referring court considers that an interpretation of Articles 46 and 59 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax is required in order to determine whether claims settlement services supplied by correspondent companies for an insurance company, in the name and on behalf of the latter, fall within the category of services supplied by consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information, in which case the exception to the general rule relating to the place of supply of services is applicable to those services.

23 The referring court recalls that some of the services at issue in this case, which were taxed in the territory of Romania, were supplied in accordance with Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive). On the basis of that legislation, bilateral cooperation agreements concerning the settlement of claims for compensation, which are the subject of the tax inspection in this case, were concluded, under which the agent is authorised and required to handle the claim for compensation in accordance with the applicable legislation and the claims settlement practices in the interests of the third-party insurer.

24 It follows from Article 5 of the Internal Regulations of the Council of Bureaux that correspondent companies have the right to claim from the insurer, inter alia, handling fees covering all other expenses, calculated in accordance with the rules approved by the Council of Bureaux. That handling commission relates to the supply of services to the third-party insurer, for the purpose of investigating damages cases, and the service provider's capacity to make decisions is subject to the objective of supplying services in the name and on behalf of the recipient insurer, in the manner most advantageous to the latter, in compliance with the applicable law, and on the basis of the agreement concluded between the parties.

25 Therefore, the present case concerns the supply by correspondent companies of complex services relating to the handling and settlement of claims for compensation, which involve multiple activities that must be regarded as forming a whole.

26 With reference to the case-law of the Court of Justice of the European Union, the referring court notes that the expression ‘other similar services’ contained in Article 59 of Directive 2006/112/EC does not concern professions such as lawyer, consultant, accounting expert or engineer, but only services. The expression ‘other similar services’ does not refer to any element common to the various activities mentioned in the directive, but to similar services in relation to each of those activities, taken separately. Since Community case-law is not therefore sufficiently precise to resolve with the necessary clarity the question of law which arises in the present case, the referring court considers it necessary to make a reference to the Court of Justice for an interpretation of the provisions of the VAT Directive.

27 Nor was the question of law which arises in this case dealt with in Case C-40/15, *Aspiro*, in which the Court of Justice analysed the tax treatment applicable to the services supplied by correspondent companies in the light of the VAT Directive and held that those services are services falling within the scope of VAT as they are not exempt from tax. The legal nature of the services supplied by correspondent companies has been addressed by the Court of Justice but, in the present case, the question arises as to whether or not those services fall within the category of similar services governed by Article 59(1)(c) of the VAT Directive. Once this issue has been resolved, the referring court will be able to determine precisely the place where those services are taxable for VAT purposes.