Case C-801/19

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:

31 October 2019

Referring court:

Upravni sud u Zagrebu (Croatia)

Date of the decision to refer:

15 October 2019

Applicant:

FRANCK d.d., Zagreb

Defendant:

Ministarstvo financija Republike Hrvatske, Samostalni sektor za drugostupanjski upravni postupak, Zagreb

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Subject matter of the case in the main proceedings

Annulment of the decision of the Ministarstvo financija Republike Hrvatske, Samostalni sektor za drugostupanjski upravni postupak (Ministry of Finance of the Republic of Croatia, Independent Department for Administrative Appeal Proceedings) of 28 July 2018, adopted in connection with an inspection for the purposes of value added tax ('VAT') for the years 2013 to 2017.

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

Request for interpretation of EU law pursuant to Article 267 TFEU and Article 19(3)(b) TEU

Question referred

1. Can a service involving funds being made available by the applicant, which is not a financial institution, for payment of a one-off fee of 1% of a particular

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amount, be regarded as 'the granting and the negotiation of credit and the management of credit by the person granting it' within the meaning of Article 135(1)(b) of the VAT Directive, despite the fact that the applicant is not formally referred to as the lender in the contract?

2. Is a bill of exchange, that is to say a security containing an obligation on the issuer to pay a specific amount of money to the person designated as the creditor in the security in question or to the person who subsequently acquired that the security in an manner prescribed by law, regarded as an 'other negotiable instrument' within the meaning of Article 135(1)(d) of the VAT Directive?

3. Does the applicant's service, by which, for a fee of 1% of the amount of the bill of exchange charged to the issuer thereof, it transferred the bill of exchange obtained to a factoring company, and transferred the amount obtained from the factoring company to the issuer of the bill of exchange, and guaranteed to the factoring company that the issuer of the bill of exchange will pay the liability arising from the bill of exchange when it becomes due, constitute:

(a) a service exempt from VAT under Article 135(1)(b) of the VAT Directive; or

(b) a service exempt from VAT under Article 135(1)(d) of the VAT Directive?

Provisions of EU law relied on

Article 135(1)(b) and (d) of Council Directive 2006/112/EC on the common system of value added tax ('the VAT Directive')

Provisions of national law relied on

Article 40(1) of the Zakon o porezu na dodanu vrijednost [Law on value added tax] ('Narodne novine' Nos 73/13, 99/13, 148/13, 153/13, 143/14 and 115/16; 'Law on VAT').

Article 67(2) of the Pravilnik o porezu na dodanu vrijednost [Regulation on value added tax] ('Narodne novine' Nos 79/13, 85/13, 160/13, 35/14, 157/14, 130/15, 115/16 and 1/17)

Succinct presentation of the facts and procedure in the main proceedings

1 The defendant's decision of 28 July 2018 ('the contested decision') dismissed the appeal brought by the applicant against the decision of the Ministarstvo financija — Porezna uprava, Ured za porezne obveznike, Zagreb [Ministry of Finance — Tax Administration, Office for Taxpayers] of 12 October 2017 ('decision at first instance'), adopted in connection with a tax inspection concerning VAT on the fee for the applicant's participation in commercial cooperation agreements in the period from 1 January 2013 to 30 March 2017. The

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decision at first instance found that the applicant underpaid VAT in the years 2013 to 2017 and charged interest for late payment of tax up to 28 August 2017. The applicant was ordered to pay the above amounts into the account designated for that purpose, calculate and pay further interest from 29 August 2017 until the date of payment and enter it in the accounts accordingly. The applicant was given a time limit by which to comply with that decision.

2 The applicant operates in the field of tea and coffee processing and is a taxable person for the purposes of VAT. During the tax inspection it was found that the applicant was conducting business with the company Konzum d.d. ('Konzum') under three types of contracts which were named as follows: loan contract, contract for the assignment of claims secured by bill of exchange, and commercial cooperation agreement. They are standard contracts which served exclusively as a formal legal basis for issuing bills of exchange. The authority at first instance found that the applicant and Konzum had concluded an agreement of 18 March 2013, stating that Invictus ulaganja d.o.o., the applicant and Konzum had concluded on 14 March 2013 a contract for the assignment of claims secured by bill of exchange, that contract governing the assignment of bills of exchange issued by Konzum, which were subsequently transferred to Franck d.d. and acquired by Invictus ulaganja d.o.o., and an agreement of 27 June 2013, stating that Erste factoring d.o.o., the applicant and Konzum had concluded on 27 June 2013 a contract for the assignment of claims secured by bill of exchange, that contract governing the assignment of bills of exchange issued by Konzum, which were subsequently transferred to Franck d.d. and acquired by Erste factoring d.o.o. The loan contract states that Konzum, as the lender, is to grant to the applicant (Franck d.d.) loans in the form of a bill of exchange, which the applicant will use for the purposes of day-to-day operations. Under that contract, the applicant undertakes to transfer the money received to Konzum on the same day as the factoring company purchases the bill of exchange from it. Under the contract for the assignment of claims secured by bill of exchange, the factoring company undertook to pay the applicant, as the client, the amount of the bill of exchange (that is to say 95-100% of that amount, depending on the contract), and in that respect it was stated that the entire liability for covering the bill of exchange issued on the basis of the applicant's claim against Konzum, which in turn is based on the invoice specifications, passes to the applicant. When the bill of exchange became due, the factoring company was to present the bill of exchange to the principal debtor for payment. It was further stated that for the applicant, who guarantees the debtor's obligation, the risk ceases only when the factoring company is satisfied by the debtor. The commercial cooperation agreement states that Konzum undertakes to reimburse the applicant all costs invoiced by the factoring company and pay it a one-off fee of 1% of the total claim set out in the bill of exchange, under the contract for the assignment of claims secured by bill of exchange, as a fee for participation in the commercial cooperation agreement.

3 The authority at first instance found that there were two transactions whereby in the first the applicant accepts bills of exchange pursuant to a loan contract and in the second, which follows immediately after the first, it assigns the bills of

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exchange received and on the same day transfers the money thus received to Konzum's account. In relation to the assigned bills of exchange the applicant assumes the risk of repayment as the refund debtor, in the event that the principal debtor named on the bill of exchange fails to pay [the money] to the holder of the bill when it becomes due, and charges an agreed fee for doing so. The authority at first instance found that during the inspection the applicant failed to present the invoices issued and other documents recording the supplies made, which would have been the basis for accepting the bills of exchange in question, and failed to indicate the invoices referred to in the contracts for the assignment of claims secured by bill of exchange which the applicant had concluded with the factoring companies. Since Konzum itself could not assign its own bills of exchange in order to obtain the money required, it concluded a commercial cooperation agreement in which it agreed a service involving the assignment of its bills of exchange, the basis for accepting the bills of exchange at issue being the loan contracts. The applicant did not make use of the funds for the purposes of its day-to-day operations, as provided for in the loan contracts. The bills of exchange at issue were not based on the supply of goods and services by the applicant and therefore the basic feature of a bill of exchange, as a means of meeting a pecuniary obligation arising from the supply of goods, was absent.

4 During the tax inspection the applicant provided invoices issued to Konzum which included fees calculated on the basis of the claims secured by bills of exchange, but excluding VAT. Each of those invoices states that it is issued on the basis of a commercial cooperation agreement and that the recipient of the invoice is charged a one-off fee of 1% of the total claim arising from the bill of exchange. Since the authority at first instance found that there was no credit relationship between the applicant and Konzum and the applicant merely obtained from it bills of exchange which it assigned to factoring companies, the authority found that the applicant relies unjustifiably on the VAT exemption and consequently established, pursuant to Articles 4, 30 and 33 of the Law on VAT, that the applicant was liable to pay VAT on the fee for assigning the bills of exchange.

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Essential arguments of the parties to the main proceedings

5 In the application the applicant complains that for the purposes of determining the taxation of the transactions at issue the defendant failed to consider separately each transaction between Konzum and the applicant, acting as a factoring company, which is not consistent with the case-law of the Court of Justice in *Card Protection Plan* (C-[349]/96) and *Volker Ludwig* (C-453/05). It points out that in the present case there are a number of legal relationships and services between the applicant and Konzum, and the applicant and the factoring companies, and that the service which the applicant supplied to Konzum had to be considered separately. It submits that the applicant lent money to Konzum under a loan contract and a commercial cooperation agreement and charged a fee for that service (which can be regarded as interest), and therefore it was essentially a party to the agreement that supplied the service. The applicant therefore claims that the service it

supplied was essentially the service of granting a loan which is exempt from VAT under Article 40(1)(b) of the Law on VAT and in that regard pointed out that it was the party which bore the economic risk of that transaction from the time of payment until the time when Konzum paid the bill of exchange in full. However, it submits that the authority at first instance concluded that the applicant is not a lender or a loan intermediary, but a borrower, for the sole reason that it was defined as a borrower in the loan contracts (and thus took account of the formal definition of the parties to the contract as a relevant factor in assessing the nature of the relationship), despite finding that the applicant did not use the money for its day-to-day operations, but immediately transferred it to Konzum.

6 The applicant further submits that even if it were a borrower, the service would be exempt from VAT under Article 40(1)(d) of the Law on VAT since it was a transaction concerning ‘other negotiable instruments’ under that provision. However, it considers that the defendant failed to take account of Court of Justice’s case-law relevant to the interpretation of Article 135(1)(b) and (d) of the VAT Directive and Article 40(1)(b) and (d) of the Law on VAT, in particular as regards the interpretation of the concept of ‘other negotiable instruments’, in respect of which it refers to the judgment of the Court of Justice in *Granton Advertising* (C-461/12). The authority at first instance concluded that there are no other negotiable instruments because the bills of exchange are not traded on the capital market. In this regard, the applicant notes that the English version of Article 135(1)(d) of the VAT Directive uses the phrase ‘negotiable instruments’, which in the Croatian version of the directive is translated as ‘utrživi instrumenti’ (trade instruments), whilst in Article 40(1)(d) of the Law on VAT, by which Article 135(1)(d) of the VAT Directive was transposed into Croatian law, the phrase ‘drugi prenosivi instrumenti’ (other negotiable instruments) is used. Therefore, the applicant refers to the judgment of the Court of Justice in *Velvet & Steel Immobilien* (C-455/05), in which the Court found that the linguistic differences in the meaning of a particular phrase cannot be interpreted to interpret the wording itself, rather they must be interpreted in the context of the aim of the VAT Directive as a whole. It submits that the phrase ‘utrživi instrumenti’ (trade instruments) has no particular meaning in Croatian law and the context of that term and existing case-law of the Court of Justice must be analysed in greater detail. It points out that VAT exemptions constitute an autonomous notion of EU law which must be interpreted uniformly in all Member States and the notion ‘drugi prenosivi instrumenti’ (‘other negotiable instruments’) must also be autonomous in relation to provisions governing the capital market. It refers to the Court of Justice’s interpretation that each of the examples mentioned in the provision of the VAT law in question grants the right to payment of a specific amount of money. It states that it is therefore considered that only those rights which, not being a debt or a cheque, grant the right to a specific monetary claim are to be considered as other negotiable instruments. The applicant considers that a bill of exchange is an instrument which entitles the holder to payment of a specific amount of money and is comparable with other instruments referred to in Article 40(1)(d) of the Law on VAT, and must therefore be regarded as another negotiable instrument within the meaning of Article 135(1)(d) of the VAT

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Directive ('drugi utrživi instrument') or Article 40(1)(d) of the Law on VAT ('drugi prenosiv instrument'), and thus transactions involving bills of exchange are exempt from VAT. It states that the defendant does not comply with the Court of Justice's case-law and refuses to apply the VAT Directive because it fails to interpret national law in conformity with the relevant provisions of EU law and the aims thereof. In this regard, the applicant refers to the interpretive effect of the directive.[1]

7 The applicant refers to Article 8(5) of the Law on VAT and Article 28 of the VAT Directive which concern situations where an intermediary acts in his own name but on behalf of another person, thereby creating the fiction that the intermediary received the service from the person on whose behalf he negotiated and then supplied it to the final user, and submits that in the present case no such situation arises. It states the applicant did not participate in the provision of the services as a covert intermediary but is party to an agreement with rights and obligations distinct and different from those of Konzum or the factoring company, which are party to the same relationship. The applicant could not negotiate on behalf of the factoring companies because the factoring companies participated directly in that relationship, for which they charged their fee on which VAT was paid. On the other hand, if the applicant negotiated on behalf of Konzum, since Konzum did not supply services subject to VAT, the fee which the applicant received would not have been subject to that tax. The fact that the applicant received money from the factoring companies does not affect the nature of the relationship between the applicant and Konzum, nor the taxation of the fee which the applicant charged for that service. Therefore, there could be no question of any covert negotiation.

8 The defendant states that in the present case there is a service involving negotiation in the payment of a debt between the factoring company and Konzum and that the 1% fee which the applicant charged for that service is subject to VAT under Article 40(1)(b) of the Law on VAT and Article 67(2) of the VAT Regulation. It is a service subject to tax and not a credit relationship or factoring because — if there were factoring — the bills of exchange issued would have to be based on the supply of goods or services and the applicant was unable to indicate a single invoice or specification which would have been the basis for those bills of exchange. In its view, not every security is automatically a negotiable instrument and in the present case the bills of exchange at issue did not satisfy the necessary conditions to qualify as being traded on the capital market. It therefore considers that there is a conventional service, which is subject to tax because it was not invoiced, and not a contractual relationship, the interpretation which the applicant advocates to justify the exemption from VAT. Therefore the case-law of the Court of Justice to which it refers does not apply. However, the applicant considers it relevant that the contractual relationship continues after the amount of money was paid into Konzum's account and it essentially constitutes a

[1] Translator's note: the (indirect) interpretative effect of the directive lies in the fact that national law must be interpreted so as to be consistent with the aim of the directive.

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loan. It submits that, under this arrangement, Konzum's obligation terminates on payment of the bill of exchange which was actually issued as a security for the current holder of the bill of exchange, that is to say the factoring companies, and that Konzum paid its debt to the applicant by paying the applicant's creditors by the transfer, thus fulfilling its obligation to the applicant.

Succinct presentation of the reasons for the request for a preliminary ruling

9 The court decided to refer questions for a preliminary ruling because there are certain differences between the wording of Article 135(1)(b) and (d) of the VAT Directive and that of Article 40(1)(b) and (d) of the Law on VAT which transposes that provision of EU law into Croatian law, in particular as regards the phrase 'utrživi instrumenti' (trade instruments) in the provision of national law and the phrase 'prenosivi instrumenti' (negotiable instruments) in the VAT Directive.[2]

10 The court takes account of the case-law of the Court of Justice, according to which the right to tax exemption is to be interpreted strictly but it is also necessary to enable undertakings to operate under approximately the same conditions. The aim of the VAT Directive is to apply provisions governing VAT which do not distort conditions of competition or hinder the free movement of goods and services. It is held that a VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services, and it is in the interests of the internal market and of all Member States to adopt a common system.

11 The national court considers that the situation at issue is not covered by either Article 40(1)(b) of the Law on VAT or Article 135(1)(b) of the VAT Directive, but is uncertain whether Article 40(1)(d) of the Law on VAT or Article 135(1)(d) of the VAT Directive may apply to it. As a matter of procedural precaution, the court decided to refer all three questions for a preliminary ruling, as requested by the applicant.

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[2] Translator's note: it should be the other way around — in the Croatian language version of the directive they are 'utrživi instrumenti' (trade instruments), whilst in the provision of national law they are 'prenosivi instrumenti' (negotiable instruments).