Case C-802/19

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:

Bundesfinanzhof (Germany)

Date of the decision to refer:

6 June 2019

Applicant and appellant in the appeal on a point of law:

Company Z

Defendant and respondent in the appeal on a point of law:

Tax Office Y

Subject matter of the main proceedings

VAT — Directive 2006/112 — Discount granted by a pharmacy in the Netherlands to persons insured under a statutory health insurance scheme in Germany in the context of their supplies of medicinal products to German health insurance funds — Reduction in the taxable amount as a result of the discount

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Based on the judgment of the Court of Justice of the European Union of 24 October 1996, *Elida Gibbs Ltd.*, C-317/94 (EU:C:1996:400), is a pharmacy which supplies medicinal products to a statutory health insurance fund entitled to reduce the taxable amount as a result of a discount granted to the persons insured under a health insurance scheme?

2. In the event that this is answered in the affirmative: Is it contrary to the principles of neutrality and equal treatment in the internal market if a pharmacy in the national territory is able to reduce the taxable amount, but a pharmacy which supplies the statutory health insurance fund by means of an intra-Community, tax-exempt supply from another Member State is not able to do so?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 2(1), 13(1), 20, 90 and 138

Brief summary of the facts and procedure

1 In the year at issue (2013), the applicant supplied, from the Netherlands, prescription-only medicinal products to Germany, to persons insured under the statutory health insurance scheme, on the one hand, and to persons insured under private health insurance schemes, on the other hand. In both cases, it made payments ('discounts'), referred to as compensation for participation, in exchange for answers to questions about the respective illnesses.

2 The applicant charged the statutory health insurance funds for the supplies to persons insured under a statutory health insurance scheme, and those supplies are the sole subject of the present dispute. The statutory health insurance funds paid on the basis of social security legislation. Since 1 October 2013, the applicant assumed, in relation to those supplies, that the place of supply was in the Netherlands, that it could benefit from tax exemption for intra-Community supplies there and that the statutory health insurance funds would be liable to pay tax on intra-Community acquisitions in the national territory. It also assumed that the discounts paid by it had reduced the taxable amount for VAT.

3 The tax office did not share the applicant's view and issued a tax assessment notice, against which the applicant filed an objection and brought an action, without success. The applicant challenges the dismissal of its action by way of its appeal on a point of law, in which it asserts, in particular, that it is entitled to a tax adjustment on account of a reduction in remuneration in accordance with the judgment of the Court of Justice of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400).

Brief summary of the basis for the reference

First question referred

4 When answering the first question, it should be noted that the present case involves a chain of two supplies, only the first of which falls within the scope of the tax.

5 The applicant provided the first supply to statutory health insurance funds. This constituted intra-Community supplies, which, by reason of the dispatch of goods from the Netherlands to Germany, were exempt from tax for the applicant pursuant to Article 138 of Directive 2006/112 and the implementing provision adopted in the Netherlands in that regard. It is true that, pursuant to Article 13(1) of Directive 2006/112, statutory health insurance funds are not to be regarded as taxable persons. Being legal persons under national law, however, the supplies were nevertheless exempt from tax in the Netherlands on the basis of Article 138 of Directive 2006/112. In accordance with this, the statutory health insurance funds were obliged to pay tax on the acquisition as a legal person pursuant to Article 2(1)(b)(i) in conjunction with Article 20 of Directive 2006/112, whereby they did not have a right of deduction as they did not have the status of a taxable person.

6 The supply by the applicant to the statutory health insurance funds was followed by a second supply by the statutory health insurance funds to the persons insured with them under a health insurance scheme. The legal relationship on which this supply is based arises from German social security law. This is because, by supplying medicinal products prescribed by a doctor, the statutory health insurance funds discharge their obligation, vis-à-vis insured persons, to provide healthcare.

7 This second supply does not fall within the scope of the tax under Article 2(1)(a) of Directive 2006/112. Firstly, it was carried out free of charge, since the persons insured under statutory health insurance schemes did not pay consideration for the individual supplies of medicinal products. The compulsory health insurance contributions paid by them and their employers constitute consideration for the insurance relationship as such, but not consideration for the services provided under it. Secondly, the supplies by statutory health insurance funds were not supplies by taxable persons pursuant to Article 13 of Directive 2006/112.

8 The fact that the applicant dispatched the goods directly to the insured persons does not preclude the existence of two supplies (applicant to statutory health insurance fund, and statutory health insurance fund to persons insured under a health insurance scheme), as already ruled by the Court of Justice on several occasions (see, for example, judgment of 6 April 2006, *EMAG Handel Eder*, C-245/04, EU:C:2006:232).

9 The present dispute concerns the question whether, as a result of the discount that it granted to the purchaser of the second supply, the applicant is able to claim a reduction in the taxable amount for the first supply to the statutory health insurance funds. It is common ground that such a discount does, in principle, lead to a reduction in the taxable amount. However, clarification is required as to whether this is also the case if the second supply does not fall within the scope of the tax. For the purpose of answering that question, it is not necessary to draw a distinction as to whether the pharmacy carries out the supply from abroad — as in the present case — or from within the national territory.

10 A requirement for the reduction could be that all transactions in the chain in question fall within the scope of the tax. This could be supported by the fact that the Court of Justice justified a reduction in the taxable amount in the case of a discount granted to the purchaser of a subsequent supply by stating that the basic principle of neutrality requires that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain (*Elida Gibbs* judgment, EU:C:1996:400, paragraph 20, and judgment of 20 December 2017, *Boehringer Ingelheim Pharma*, EU:C:2017:1006, paragraph 33). The referring court takes the view that the length of that production and distribution chain is determined by the transactions that fall within the scope of the tax pursuant to Article 2(1) of Directive 2006/112.

11 In its judgment in *Boehringer Ingelheim Pharma* (EU:C:2017:1006), concerning the granting of discounts to private health insurance companies, the Court of Justice assumed that a chain of transactions falling within the scope of the tax existed where pharmacies made the last supply in the chain of transactions and thus ‘make supplies [of medicinal products] to persons covered by private health insurance’, for which remuneration was paid. The discount reduced the expenses of the private health insurance companies and thus the expenses of the person who had to bear the costs of the taxable acquisition of the medicinal products. This is not the situation in the present case: the granting of discounts to persons insured under a statutory health insurance scheme has no effect whatsoever on the expenses to be paid by the statutory health insurance funds.

Second question referred

12 The second question referred, which arises only if the first question is answered in the affirmative, could be answered in the negative for the simple reason that, in its judgment of 19 October 2016, *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:776), the Court of Justice removed the prohibition on discounts for the supply of medicinal products only in respect of pharmacies located abroad, meaning that it continues to apply unchanged to pharmacies within the national territory. Already with regard to the prohibition on the granting of discounts for pharmacies within the national territory, it may not be necessary to ask the question regarding unequal treatment between pharmacies located abroad and those within the national territory in terms of the VAT consequences of the granting of such discounts.

13 If the Court of Justice were to regard this as immaterial, it would be necessary to consider the meaning of Article 90 of Directive 2006/112.

14 Two reasons militate against a reduction in the taxable amount pursuant to Article 90 of Directive 2006/112 in favour of the applicant. Firstly, it has not made any taxable transactions within the national territory in relation to the supplies for which a tax reduction could be considered. As the supplies made to the statutory health insurance funds were dispatched from the Netherlands, there is no taxable transaction in Germany for which the taxable amount could be reduced there. Secondly, the transactions conducted in the Netherlands in relation to the statutory health insurance funds are exempt from tax there as intra-Community supplies.

15 The second question referred could nevertheless be answered in the affirmative, since, according to the concept on which Directive 2006/112 is based, the Netherlands and Germany belong to an internal market under VAT law. On that basis, a supply from the Netherlands to Germany should not actually be treated any differently from a supply within the national territory.

16 However, in the year at issue, the process of building the internal market between the Member States of the European Union was still incomplete, as national taxation sovereignty still existed (and continues to exist). Therefore, supplies from one Member State to another Member State between taxable persons — or, as in the present case, by taxable persons to legal persons — are subject to the special arrangements which result in tax exemption as an intra-Community supply in the Member State of dispatch (here: the Netherlands) pursuant to Article 138 of Directive 2006/112 and in tax liability as an intra-Community acquisition pursuant to Article 2(1)(b) in conjunction with Article 20 of Directive 2006/112 in the Member State of destination (here: Germany).

17 Taken together, these two elements constitute an intra-Community transaction which transfers the taxation from the Member State of dispatch to the Member State of destination. In this regard, the Court of Justice has already held that the intra-Community supply of goods and their intra-Community acquisition are ‘one and the same financial transaction’ (judgment of 27 September 2007, *Teleos*, C-409/04, EU:C:2007:548, paragraphs 23 and 24) and are thus part of an ‘intra-Community transaction’ (*Teleos* judgment, EU:C:2007:548, paragraphs 37 and 41), the purpose of which is to ‘transfer … the tax revenue to the Member State in which final consumption of the goods supplied takes place’ (*Teleos* judgment, EU:C:2007:548, paragraph 36, and judgments of 27 September 2009, *Collee*, C-146/05, EU:C:2007:549, paragraph 22, of 27 September 2007, *Twoh International*, C-184/05, EU:C:2007:550, paragraph 22, of 22 April 2010, *X and fiscale eenheid Facet-Facet Trading*, C-536/08 and C-539/08, EU:C:2010:217, paragraph 30, and of 7 December 2010, *R.*, C-285/09, EU:C:2010:742, paragraph 37).

18 In the light of the aforementioned rules on the internal market, the question arises as to whether, even though the applicant did not carry out any taxable transactions in Germany in respect of the supplies at issue in the present case, it should nevertheless not be treated as if such a transaction existed. Having regard to the dispatch of the supplied goods to Germany, the tax-exempt intra-Community supply in the Netherlands would then have to be treated as a transaction that is taxable in Germany.

19 Equal treatment of transactions within the internal market and domestic transactions would militate in favour of this. In a true internal market, the supplies carried out by the applicant would have to be treated as domestic supplies, with the result that there would have to be a tax adjustment as a result of the reduction in remuneration. It would then be irrelevant that the tax for the supply by the applicant is not to be borne by the latter, but by the statutory health insurance funds within the framework of tax on acquisitions.

20 It is not possible to obtain any clarification in this regard from the judgment of 15 October 2002, *Commission v Germany* (C-427/98, EU:C:2002:581, paragraphs 64 and 65), since, according to the understanding of the referring court, it did not rule on the possibility of a reduction in remuneration in the Member State of destination (here: Germany).