Case C-907/19

Request for a preliminary ruling

Date lodged:

11 December 2019

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

5 September 2019

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

Q-GmbH

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

Z Tax Office

BUNDESFINANZHOF (FEDERAL FINANCE COURT)

ORDER

In the case of

Q-GmbH

applicant and appellant in the appeal on a point of law

[…]

v

Z Tax Office

defendant and respondent in the appeal on a point of law

concerning turnover tax in 2011,

the 5th Chamber

made the following order on 05 September 2019:

Operative part

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling:

Does a service related to insurance and reinsurance transactions that is performed with exemption from tax by insurance brokers and insurance agents within the meaning of Article 135(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common **[Or. 2]** system of value added tax exist if a taxable person who carries out intermediary work for an insurance company also provides that insurance company with the mediated insurance product?

II. The proceedings are stayed until the Court of Justice of the European Union has given a ruling.

Grounds

I.

1 The applicant and appellant in the appeal on a point of law ('applicant'), Q-GmbH, is the universal successor of Q-GmbH & Co KG, which, in turn, was the universal successor of a different company also referred to here as Q-GmbH.

2 In 2009, pursuant to Paragraph 89(2) of the Abgabenordnung (General Tax Code), Q-GmbH made a request for binding information concerning exemption from VAT under Paragraph 4(11) of the Umsatzsteuergesetz (Law on turnover tax, 'the UStG') of services for mediating insurance cover for specific risks arising from offences committed by third parties (such as in the case of kidnapping or piracy), and also presented a draft contract. The draft contract provided for

– the mediation of insurance policies,

– the granting of a licence for the provision of an insurance product, and

– the provision of other services facilitating the performance of insurance contracts (services facilitating the performance of contracts, including the settlement of claims).

3 Of these services, the defendant and the respondent in the appeal on a point of law (the Tax Office — 'FA') regarded, in its binding information of 18 January 2010

– only the mediation of insurance policies as being exempt, whereas it took the view that

– the granting of a licence for the provision of an insurance product, and

– the other services facilitating the performance of insurance contracts, such as risk assessment using a pricing tool, contract management, receiving premiums, the settlement of claims and general support (services facilitating the performance of contracts, including the settlement of claims)

were taxable services. The FA found that they did not form part of a single supply, since the individual services were independent in nature. **[Or. 3]**

4 In the year at issue, 2011, Q-GmbH, as a so-called underwriting agent, developed and marketed in particular an insurance product via which ships and their crews were insured against piracy whilst in transit through the Gulf of Aden.

– Pursuant to Clause 1(1) of the underwriting agreement entered into with F-Versicherungs-AG (F), Q-GmbH mediated insurance contracts for the insurer that were entered into between the insurer and the policyholder. Pursuant to Clause 1 of the contract, the object of those insurance contracts was insurance cover for ‘Special Risks’.

– Pursuant to Clause 1(2) of the contract, Q-GmbH provided the insurer with the insurance products in accordance with the wording, enclosed as an annex, regarding the issuing of policies in the name of the insurer. The insurance products were made available via the granting of a non-exclusive right of use (‘license’).

– Pursuant to Paragraph 1(3) of the contract, Q-GmbH had to provide services facilitating the performance of contracts, including the settlement of claims, such as adaptation of the insurance product, risk assessment using a pricing tool, contract management, setting up an emergency hotline, claims management, sales training and the provision of a crisis manager.

5 Pursuant to Paragraph 2(1) of the contract, the insurer had to pay a monthly advance brokerage fee of EUR 30 000 to cover ongoing operational activities over a period of 24 months commencing on 1 January 2010. In addition, it also had to pay a brokerage fee in the amount of 22.5% of the net premium for each special risk insurance policy taken out by the insurer. The obligation to pay the brokerage fee applied irrespective of whether the insurance contract was concluded by the underwriter, the insurer or a third party. Pursuant to Paragraph 2(5) of the contract, the claims to the brokerage fee were to be offset against the advance payment made by the insurer, up to the amount of that advance payment. At the end of the contract term, there was an obligation to repay any shortfall, whereby the repayment obligation was limited to EUR 240 000. In an addendum to the contract, the insurer had to pay a monthly advance brokerage fee of EUR 7 500 to cover ongoing operational costs for the period of June 2011 to December 2012.

6 On 27 August 2012, Q-GmbH submitted its VAT declaration for 2011, in which it claimed that its services were exempt as a whole pursuant to Paragraph 4(11) UStG. In an **[Or. 4]** accompanying letter, it referred to the binding information of 18 January 2010, which took a different view of that.

7 Following a VAT audit, the FA concluded, in line with the binding information of 18 January 2010, that the services did not form part of a single supply and only the direct activity of insurance mediation was exempt from tax under Paragraph 4(11) UStG. The transfer of the licence was subject to the reduced tax rate under Paragraph 12(2)(7)(c) UStG, whereas the standard tax rate was applicable to the other services facilitating the performance of contracts, including the settlement of claims. The FA took the view that 67% of the total remuneration consisted of insurance mediation, which was exempt from VAT, 25% consisted of the granting of the licence, which was subject to the reduced tax rate, and 8% consisted of the management service, which was subject to the standard tax rate. That breakdown was based on an estimation that took account of the staff's working time records. Input tax amounts were taken into account. The objection to the VAT assessment notice of 4 November 2013 and the subsequent action before the Finanzgericht (Finance Court, 'FC') were unsuccessful.

8 According to the […] judgment of the FC, the tax liability assumed in the tax assessment notice of 4 November 2013 was in line with Paragraph 4(11) UStG, which was to be interpreted in accordance with Article 135(1)(a) of Council Directive 2006/112/EC of 28/11/2006 on the common system of value added tax ('the VAT Directive') and taking account of the case-law of the Court of Justice of the European Union ('the CJEU') and the Bundesfinanzhof (Federal Finance Court, 'the BFH'). The applicant provided a significant number of services which did not form part of the core activities of an insurance agent or broker and which — contrary to the view taken by the FA — formed part of a single supply. That supply was subject to tax as a whole — once again contrary to the view taken by the FA. The focus and therefore the principal element that determines the overall supply consisted in the development of new insurance products in order to make it possible to sell insurance policies. The conditions for insurance products had been developed taking account of regulatory requirements. This corresponded, in essence, to the activity of an insurer, but without insurance cover being provided, meaning that there was no exemption under Paragraph 4(10) UStG. The right to remuneration did not depend on who had mediated the conclusion of the contract. On the other hand, remuneration for insurance mediation activity in respect of contracts concluded by the insurer without an intermediary or via the intermediation of third parties did not come into consideration. It followed from the nature of the remuneration that the insurer intended to preserve the possibility of using an insurance product **[Or. 5]** in order to for it to be sold by whomever the insurer wished. The granting of a non-exclusive right of use ('license') also suggested that this was the case. In addition, due to the repayment obligation limited to EUR 240 000, a minimum price of EUR 480 000 had been agreed for developing and making it possible to use the special risk insurance policies. Such a high minimum price was not offered solely for the promise of a an intermediary to mediate the sale of insurance. It therefore had to be concluded that the tax liability was more extensive than that assumed by the FA. However, the prohibition on putting a party in a worse position than if he had not taken legal action (prohibition of reformatio in peius) had to be observed in the proceedings of the action.

9 Following the notification of the judgment of the FC, the FA issued a VAT assessment amendment notice on 17 November 2017, in which it regarded the services provided in the year at issue to be fully taxable, putting the applicant in a worse position than it was in before the judgment.

10 The applicant challenges the judgment of the FC by way of its appeal on a point of law.

II.

11 The Chamber has referred the question of interpretation set out in the headnote to the CJEU and has stayed the proceedings pending the ruling of the CJEU.

12 1. Legal context

13 a) EU law

Pursuant to Article 135(1)(a) of the VAT Directive, Member States are to exempt insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents.

14 b) National law

Pursuant to Paragraph 4(11) UStG, the transactions arising from the activities of building society representatives, insurance agents and insurance brokers are exempt from tax.

15 In addition, separate tax exemption exists for insurance transactions listed in Paragraph 4(10) UStG, which is not applicable in the present dispute.

16 2. Initial observations on the question referred for a preliminary ruling

17 **a) Taxation of services forming part of a single supply**

According to the case-law of the CJEU, ‘a single supply …, comprised of two distinct **[Or. 6]** elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different rates of value added tax, must be taxed solely at the rate of value added tax applicable to that single supply, that rate being determined according to the principal element, even if the price of each element forming the full price paid by a consumer in order to be able to receive that supply can be identified’ (*Stadion Amsterdam* judgment of the CJEU of 18 January 2018, C-463/16, EU:C:2018:22, answer to the question referred).

18 The Chamber infers two things from this:

Firstly, a single supply is not subject to different tax rates according to its elements, but only one tax rate. Secondly, the taxation of the single supply — which must therefore be imposed in relation to the services as a whole — is determined by the principal element of that supply.

19 b) Assessment in the present dispute

aa) The present dispute concerns a supply comprised of several elements. These are:

– insurance mediation,

– the granting of a licence for the provision of an insurance product, and

– the services facilitating the performance of a contract, including the settlement of claims.

20 As correctly ruled by the FC, according to the standards established in the case-law of the CJEU in relation to these activities, a single supply exists, the principal element of which is the granting of a licence for the provision of an insurance product and the other elements of which, consisting of insurance mediation and services facilitating the performance of a contract, including the settlement of claims, are merely ancillary services. This is apparent solely from the fact that, without the licence having been granted, there would not have been any insurance mediation activity, and the applicant was promised a right to remuneration even in the event that third parties mediated insurance on the basis of the licence granted, irrespective of whether such mediation actually took place at a later point in time.

21 bb) According to that, the applicant's services would be taxable as a whole. This is because, as with the tax rate for services forming part of a single supply (see II.2.a above), the decision regarding the exemption of services forming part of a single supply can be taken only in relation to the services as a whole, whereby, as with the determination of the tax rate, this is based on the principal element (see 11.2.a above). This consists of the granting of a licence for the provision of an insurance product. This service is not in itself exempt under Article 135(1)(a) **[Or. 7]** of the VAT Directive, as the provision of the insurance product is part of the work of the insurance company, which is not exempt under that provision if outsourced to third parties (judgment of the CJEU, *Arthur Andersen*, of 3 March 2005 — C-472/03, EU:C:2005:135, paragraph 32 et seq.). In addition, this likewise applies to the ancillary services facilitating the performance of contracts, including the settlement of claims.

22 However, the Chamber has doubts as to whether this interpretation is correct taking account of the *Aspiro* judgment of the CJEU of 17 March 2016 (C-40/15, EU:C:2016:172) and therefore requests an answer to the question referred, which is explained below.

23 3. The question referred

24 a) *Aspiro* judgment of the CJEU

According to the *Aspiro* judgment of the CJEU (EU:C:2016:172, paragraph 37), exemption under Article 135(1)(a) of the VAT Directive requires, firstly, that the

service provider has a relationship with both the insurer and the insured party and, secondly, that its activities cover the essential aspects of the work of an insurance agent, such as the finding of prospective clients and their introduction to the insurer. There is therefore no exemption if a trader settles claims in the name and on behalf of an insurance company (judgment of the CJEU, *Aspiro*, EU:C:2016:172, answer to the question referred). The required link to the finding of prospective clients and their introduction to the insurer with a view to the conclusion of insurance contracts does not exist in such a case (judgment of the CJEU, *Aspiro*, EU:C:2016:172, paragraph 40).

25 b) Differences in comparison with the *Aspiro* judgment of the CJEU

The dispute to be assessed here differs from that in the *Aspiro* case in that the activity of the taxable person in the *Aspiro* case was confined to the settling of claims and it therefore carried out an exclusively taxable activity. By contrast, in the present case, the applicant carried out activities which, when considered separately, were of a different nature — without the existence of a single supply.

– The taxable activities included the granting of a licence to provide an insurance product and the services facilitating the performance of contracts, including the settlement of claims.

– In addition, however, the applicant also performed the work of an insurance agent, which, assessed separately, would be **[Or. 8]** exempt under Article 135(1)(a) of the VAT Directive.

26 c) Subject matter of the question referred

27 The Chamber takes the view that clarification from the CJEU is required as to how much significance is to be attached to Article 135(1)(a) of the VAT Directive with regard to the exemption of services forming part of a single supply.

28 aa) According to general principles, the decision regarding taxation of a single supply is to be made in relation to the services as a whole and according to its principal element (see II.2.a above). According to that, the single supply as a whole is either exempt or taxable, whereby the exemption of the single supply requires that its principal element meet the requirements of exemption. Accordingly, it would have to be assumed that the service provided by the applicant is fully taxable, since the principal element of its service consisted in the provision of an insurance product, not in insurance mediation (see II.2.b above).

29 bb) However, the Chamber has doubts as to whether, taking account of the *Aspiro* judgment of the CJEU (EU:C:2016:172), this also applies to exemption under Article 135(1)(a) of the VAT Directive. That CJEU judgment could be interpreted as meaning that a single supply is exempt even if only one ancillary service meets the requirements of exemption.

30 The question therefore arises as to whether a single supply consisting of

– insurance mediation,

– the granting of a licence for the provision of an insurance product, and

– services facilitating the performance of a contract, including the settlement of claims

is exempt as a whole, even though only one ancillary service (insurance mediation) would be exempt if considered separately, but that ancillary service is directly related to the other services, which contribute to the essence of the activities of an insurance company. The role of the insurance agent is therefore more extensive in view of the increased risk to be insured.

31 4. Relevance of the question referred

32 If it is sufficient for the single supply to be exempt under Article 135(1)(a) of the VAT Directive if only one ancillary service is exempt under that provision, **[Or. 9]** the judgment of the FC must be set aside and the action upheld. In other respects, the dismissal of the action by the FC proves to be correct.

33 Moreover, the present dispute does not concern the question of whether the binding information of 18 January 2010 is in fact binding, as the FC did not go beyond it.

34 5. Legal basis of the reference

35 The reference is based on Article 267 of the Treaty on the Functioning of the European Union.

36 6. The stay of proceedings

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