Case C-324/20

Request for a preliminary ruling

Date lodged:

22 July 2020

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

7 May 2020

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

Finanzamt (Tax Office) B

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

X-Beteiligungsgesellschaft mbH

BUNDESFINANZHOF (FEDERAL FINANCE COURT)

ORDER

In the case of

Tax Office B

Defendant and appellant in the appeal on a point of law

v

X-Beteiligungsgesellschaft mbH

Applicant and respondent in the appeal on a point of law

[…]

concerning turnover tax in 2012,

the Fifth Chamber **[Or. 2]**

made the following order on 7 May 2020:

Operative Part

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

1. Does a service provided on a single occasion and therefore not in relation to a certain period of time give rise to successive statements of account or successive payments within the meaning of Article 64(1) of the VAT Directive merely on the basis of an agreement to pay in instalments?

2. Alternatively, if the first question is answered in the negative: Is non-payment within the meaning of Article 90(1) of the VAT Directive to be assumed if the taxable person, when providing his service, agrees that the service is to be paid for in five annual instalments and the national law relating to cases of subsequent payment provides for an adjustment by which the previous reduction in the taxable amount is cancelled again in accordance with that article?

II. […]

Grounds

I.

1 The applicant and respondent in the appeal on a point of law (applicant) pays tax on its turnover on the basis of the remuneration agreed according to Paragraph 13(1)(1)(a) of the Umsatzsteuergesetz (Law on turnover tax, 'the UStG'). In the contested year of 2012, it provided a taxable mediation service for T-GmbH (GmbH) on the basis of a fee agreement of 7 November 2012. According to the latter, the GmbH (principal) commissioned the applicant (agent) to act as an intermediary in a contract for the purchase of a property in M. According to the preamble to the agreement, the contract for the purchase of the property had already been certified and it had been established that the agent had met all of its obligations resulting from this commission. In return, it was agreed that the agent should receive a fee of EUR 1 000 000 plus VAT from the principal. The agreed fee was to be paid in five instalments of EUR 200 000 plus turnover tax. The instalments were due at yearly intervals and the first instalment was payable on 30 June 2013. The principal was required to provide the agent with security for the meeting of fee payments. In subsequent years, the applicant

issued invoices with tax statements relating to those respective instalments on the respective due dates which had been received and on which tax had been paid corresponding to the sum received. **[Or. 3]**

2 Following a special turnover tax audit, the defendant and appellant in the appeal on a point of law (the Tax Office) took the view that the applicant was required to pay tax on the entire mediation fee on the basis of the mediation service already provided in the contested year. The Tax Office did not accept the applicant's objection that it still had to provide further marketing services from 2013 to 2018 and that an annual payment of EUR 200 000 was owed on condition that appropriate progress was made on the project, nor did it accept a supplementary agreement of 15 March 2016 according to which what was referred to as a lead estate agent marketing order with a contingency fee was created, to the effect that the agent procured the property to which the contract related for the principal and supported the overall project devised by the principal for that purpose through active involvement in further marketing. The Tax Office therefore amended the 2012 turnover tax assessment by decision of 22 December 2016. The objection was unsuccessful.

3 In contrast, the Finanzgericht (Finance Court, Germany) largely accepted the action […]. The applicant had already provided its mediation service in the contested year as stated in the fee agreement. Contrary to the view expressed by the applicant, a different interpretation according to the supplementary agreement could not be considered. That did not mean that the agreements reached therein already existed at the time of the original fee agreement. However, given the case-law of the Court of Justice of the European Union (Court of Justice) relating to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) and the case-law of the Bundesfinanzhof (Federal Finance Court), with the exception of the first sum received in the following year of 2013, unrecoverability according to Paragraph 17(2)(1) and the first sentence of Paragraph 17(1) of the UStG was to be applied. The Tax Office opposes this by way of its appeal on a point of law.

II.

4 **1. Legal context**

5 **(a) EU law**

Article 63 of the VAT Directive provides as follows:

'The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.' **[Or. 4]**

6 Article 64(1) of this Directive states as follows:

'Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain

period or the sale of goods on deferred terms, as referred to in point (b) of Article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.'

7 Article 66(1) of the Directive reads as follows:

'By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

(c) where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.'

8 Article 90 of this Directive states as follows:

'(1) In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.'

(2) In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

9 **(b) National law**

Paragraph 13(1)(1) of the UStG provides as follows:

'Tax shall become chargeable

1. on supplies of goods and other services

10 (a) in cases where tax is calculated on the basis of the remuneration agreed (Paragraph 16(1), first sentence), upon expiry of the prepayment period in which the supplies of goods or services were made. This shall also apply to part supplies. Supplies are part supplies where it is agreed that certain parts of an economically divisible supply are to be paid for separately. Where the remuneration or part remuneration is received before the supply or part supply has been made, tax shall become chargeable thereon upon expiry of the prepayment period in which the remuneration or part remuneration was received, **[Or. 5]**

(b) in cases where tax is calculated on the basis of the remuneration collected (Paragraph 20), upon expiry of the tax period in which the remuneration was received.'

11 Paragraph 17 of the UStG provides as follows:

‘(1) When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1)(1) has changed, the trader who made the supply shall adjust the amount of tax payable accordingly. (…)

(2) Subparagraph 1 shall apply *mutatis mutandis* where

12 1. the remuneration agreed for a taxable supply of goods or other services or a taxable intra-Community acquisition has become unrecoverable. If the remuneration is received retrospectively, the amount of the tax and the deduction of tax shall be readjusted.’

13 The first sentence of Paragraph 20 of the UStG in the version applicable in the contested year read as follows:

‘On application, the Tax Office may allow a trader,

14 1. whose total turnover (Paragraph 19(3)) in the preceding calendar year did not exceed EUR 500 000 [from 1 January 2020: EUR 600 000], or

2. who is exempt from the obligation to keep accounts and to draw up annual stock inventories under Paragraph 148 of the Abgabenordnung (Tax Code), or

3. whose turnover derives from an activity as a member of a liberal profession within the meaning of Paragraph 18(1)(1) of the Einkommensteuergesetz (Law on income tax),

15 to calculate turnover tax on the basis of the remuneration received rather than on the basis of the remuneration agreed (first sentence of Paragraph 16(1)).’

16 **2. First question referred**

17 **a) Preliminary remarks**

The Court of Justice held, in its judgment of 29 November 2018, *baumgarten sports & more* (C-548/17, EU:C:2018:970[…]), that Article 63 of the VAT Directive, read in conjunction with Article 64(1) thereof, precluded the chargeable event and chargeability of a tax on the supply of agency services for professional football players by an agent, such as that at issue in the main proceedings, paid in **[Or. 6]** conditional instalments over several years further to the placement, from being regarded as occurring or taking effect when the player is placed.

18 In support of that interpretation, the Court of Justice referred to the fact that it appears to be the case in such a service, which entails negotiating the placement of a player for a certain number of seasons with a club, and is remunerated by means of conditional payments in instalments over several years, further to the placement, that services within the meaning of Article 64(1) of the VAT Directive give rise to successive statements of account or successive payments (judgment of

the Court of Justice, *baumgarten sports & more*, EU:C:2018:970, paragraphs 29 and 30[…]).

19 The Chamber hearing the application accepted this in its following judgment and decided that traders providing mediation services remunerated in instalments could invoke a direct application of Article 64(1) of the VAT Directive ([…]) and, for the case in suit in that instance, based this decision on the grounds that it was irrelevant whether, for example in the case of a transfer of use, it was a service provided in relation to a certain period of time. It was instead sufficient that a mediation service was remunerated according to the permanence of the outcome achieved (here: the player staying with the receiving club for the agreed duration of the contract) […].

20 (**b) The question of law at issue**

21 (aa) According to a literal interpretation of Article 64(1) of the VAT Directive, the answer to the first legal question may be in the affirmative even if the present case only relates to an exception to Article 63 of the VAT Directive. This is because, in the present case of a time limit on payment claims, as in the case of an agreement over payment in instalments, according to the wording of this provision, the service gives rise to successive statements of account or successive payments.

22 (bb) Nevertheless, the Chamber has doubts over the interpretation of Article 64(1) of the VAT Directive. These doubts result from the fact that this provision excludes from its scope any agreement over payment in instalments, as also exists in the present case, in the event of supply through the sale of goods on deferred terms. Article 64(1) of the VAT Directive does not contain a comparable exclusion for services as in the present case.

23 This may possibly be due to the fact that, through Article 64(1) of the VAT Directive, the EU legislature merely adopted, without making any changes to it, a rule which already existed in the second sentence of Article 10(2)(1) **[Or. 7]** of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC) when that directive entered into force. There may therefore be reason to assume that, when Directive 77/388/EEC entered into force, the legislature did not consider the case — of which it may not have been aware at the time — of payment in instalments for services, but would have excluded this case from the scope of Article 64(1) of the VAT Directive, as with the sale of goods on deferred terms, if it had known about this possible scenario.

24 This has meant that supplies of goods and services are treated the same.

25 Furthermore, a literal application of Article 64(1) of the VAT Directive could result in an excessive restriction of Article 63 of the VAT Directive. This is because, as far as services are concerned, a literal application of Article 64(1) of the VAT Directive would ultimately result in the chargeable event arising not when the service is provided, as provided for in Article 63 of the VAT Directive,

but instead only on respective receipt of payment in accordance with the authorisation in Article 66(1)(c) of the VAT Directive.

26 (cc) It should also be pointed out that the present case may possibly differ in legally relevant terms from the scenario in the '*baumgarten sports & more*' case (EU:2018:970[…]). For example, the '*baumgarten sports & more*' case (EU:2018:970[…]) related to payment claims which depended on a condition being met, in that case the existence of the contract of employment with the placed player at certain points in time. It was not certain whether this condition was being met at the stipulated point in time when the placement service was being provided.

27 In contrast, in the present case, there is only a time limit, not a condition that is not known to have been met. As in the case of a sale of goods on deferred terms, the existence of the payment claim was therefore certain at the stipulated point in time. Based on the findings of the Finance Court which are binding on the Chamber […], this was not a scenario in which the mediation service was paid for according to the permanence — or equally the sustainability — of the outcome achieved […]. As a result, contrary to the view presented by the applicant, no condition has been met as in that case either.

28 (dd) Finally, it is questionable what significance should be attributed to the reference in the judgment of the Court of Justice, *baumgarten sports & more* (EU:C:2018:970[…]) to the judgment of the Court of Justice **[Or. 8]** of 3 September 2015, *Asparuhovo Lake Investment Company*, (C-463/14, EU:C:2015:542, paragraphs 49 and 50[…]). This is because that case related to a consultancy service continually provided over a longer period of time, whilst the mediation service is not provided in relation to a certain period of time, but as a one-off service relating to a single point in time. The Court of Justice affirmed that '[giving] rise' [to successive payments] within the meaning of Article 64(1) of the VAT Directive applies to consultancy services made available to a client continually and paid for through recurring fixed amounts — irrespective of whether the agent had provided its client with actual consultancy services during that period of time. This may support the view that successive statements of account or successive payments are dependent on the fact that the services to which the statements of account relate have, in the broadest sense, some 'relationship to the future' or a 'ripple effect'.

29 This corresponds to the national concept of part supply in the second and third sentences of Paragraph 13(1)(1)(a) of the UStG which depends on an economic divisibility of the service such as in the case of hire based on a monthly hire charge agreement. On this basis and contrary to the aforementioned case-law (see II.2.a above), the Court of Justice should refuse *a priori* the application of Article 64(1) of the VAT Directive to mediation services.

30 **c) Relevance to the ruling**

The national law contains no rule corresponding to Article 64(1) of the VAT Directive. As a result, it must be assumed that a tax arises precisely when the service is provided in the contested year. This provision would run counter to the latter if it interpreted such that it applies to services that are also based on agreements over payment in instalments.

31 **3. Second question referred**

32 **a) Preliminary remarks**

According to Article 90(1) of the VAT Directive, in particular in the event of total or partial non-payment after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

33 It is unclear, when interpreting this provision, what significance should be attributed to the case-law of the Court of Justice that 'in the field of VAT, **[Or. 9]** taxable persons act as tax collectors for the State' (judgment of the Court of Justice of 20 October 1993, *Balocchi*, C-10/92, EU:C:1993:846, paragraph 25[…]). The Court of Justice explained this function of 'tax collectors for the State and on behalf of the treasury' on the basis that taxable persons '[owe] VAT even though this, as a tax on consumption, is ultimately borne by the final consumer' (judgment of the Court of Justice of 21 February 2008, *Netto Supermarkt*, C-271/06, EU:C:2008:105[…]).

34 **b) The question of law at issue**

In the opinion of the Chamber, the tax collector function of a taxable person within the meaning of the aforementioned Court of Justice case-law includes the possibility of preventing, through the application of Article 90(1) of the VAT Directive, the taxable person from having to pre-finance the tax already owed by him for the period of provision of the service over a period of a number of years (see, in relation hereto, also the third question of the Chamber's order for reference of 21 June 2017[…] which the Court of Justice did not have to answer in its *baumgarten sports & more* judgment, EU:C:2018:970[…]).

35 It is therefore important, as far as the present case is concerned, whether it is consistent with the function of a tax collector, in relation to a service already provided on 7 November 2012, to assume that tax had arisen for that year (in answering the first question in the negative) without any reduction of the taxable amount even though this service was supposed to be paid for, according to the agreement reached at that point in time, through five annual payments with the first due date on 30 June 2013. This would then constitute pre-financing of the tax by the applicant in the contested year even though receipt of the payment occurred only later over a period of five years.

36 The Chamber is careful to point out here that the national law, through the second sentence of Paragraph 17(2)(1) of the UStG, contains a provision according to

which, following a reduction within the meaning of Article 90(1) of the VAT Directive, the taxable amount is to be increased again if payment is subsequently made (see, in relation hereto, the judgment of the Court of Justice of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887[…]).

37 **c) Relevance to the ruling**

The second question is also relevant to the ruling since the action also has to be allowed if the reduction according to Article 90 of the VAT Directive is affirmed. **[Or. 10]**

38 **4. Legal basis of the reference**

The request for a preliminary ruling is made to the Court of Justice on the basis of Article 267 of the Treaty on the Functioning of the European Union.

39 **5. The stay of proceedings**

[…].