Case C-808/23

Request for a preliminary ruling

Date lodged:

27 December 2023

Referring court:

Högsta förvaltningsdomstolen (Sweden)

Date of the decision to refer:

21 December 2023

Appellant:

Högkullen AB

Respondent:

Skatteverket

[…]

APPELLANT

Aktiebolaget Högkullen […]

[…] Göteborg

RESPONDENT

Skatteverket

[…]

JUDGMENT UNDER APPEAL

Judgment of the Kammarrätten i Göteborg (Administrative Court of Appeal, Gothenburg, Sweden) of 3 March 2021 […]

SUBJECT MATTER

Value added tax (‘VAT’) and tax surcharge; request for a preliminary ruling from the Court of Justice of the European Union

The case is presented.

The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) makes the following

ORDER

A request for a preliminary ruling in accordance with Article 267 TFEU is to be made to the Court of Justice of the European Union as set out in the annexed request for such preliminary ruling (annex to the minutes).

[…]

ANNEX

Request for a preliminary ruling in accordance with Article 267 TFEU concerning the interpretation of Articles 72 and 80 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘the VAT Directive’)

Introduction

1 The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) seeks a preliminary ruling in order to clarify how Articles 72 and 80 of the VAT Directive are to be interpreted as regards the determination of the open market value of services supplied by a parent company to its subsidiary. The questions referred for a preliminary ruling have arisen in a case concerning the calculation of the taxable amount in which the Skatteverket (Swedish Tax Agency) applied national rules on revaluation introduced on the basis of Article 80 of the VAT Directive.

Relevant provisions of European Union law

2 It follows from Article 73 of the VAT Directive that, as a general rule, the taxable amount is the consideration for goods or services.

3 Under Article 80, Member States may, in order to prevent tax evasion or avoidance, take measures to ensure that, in certain defined cases, the taxable amount corresponds to the open market value. In accordance with point (a) of paragraph 1, this applies, inter alia, where there are management or ownership ties

as defined by the Member State, the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction.

4 For the purposes of applying the VAT Directive, the concept of 'open market value' is defined in Article 72. With regard to services, the first paragraph provides that 'open market value' means the full amount that, in order to obtain the services in question at that time, a customer at the same marketing stage at which the supply of services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax. Where no comparable supply of services can be ascertained, 'open market value' means, according to the second paragraph of Article 72, an amount that is not less than the full cost to the taxable person of providing the service.

Relevant provisions of national law

5 During the accounting periods at issue in the case, the mervärdesskattelagen (1994:200) (Law on value added tax) was in force. That law was replaced by a new mervärdesskattelag (2023:200) (Law on value added tax), but the previous law still applies, in so far as is relevant here, to situations prior to the entry into force of the new law. The applicable provisions of the 1994 Law are set out below. In essence, the new law contains equivalent provisions.

6 It follows from Paragraphs 2 and 3 of Chapter 7 that, as a general rule, the taxable amount is the consideration for goods or services.

7 In accordance with Paragraph 3a of Chapter 7, the taxable amount is the open market value where the consideration is lower than the open market value, the customer does not have a full right of deduction, the vendor and the customer are connected to each other and the taxable person is not able to demonstrate to the requisite legal standard that the consideration is in line with market conditions.

8 The first subparagraph of Paragraph 9 of Chapter 1 provides that, with regards to services, open market value means the full amount that a customer of a service, at the same marketing stage at which the supply of services takes place, would have to pay, at the time of the supply and under conditions of fair competition, to a vendor at arm's length for such a service situated within the national territory. According to the second subparagraph, where no comparable supply of services can be ascertained, the open market value is an amount which is not less than the full cost to the taxable person of providing the service.

The facts of the case

9 The case concerns Aktiebolaget Högkullen, the parent company of a real estate management group. The real estate management is carried out by its subsidiaries. In 2016, it had 19 direct and indirect subsidiaries.

10 The activities of the subsidiaries are partially exempt from tax and, therefore, they are not entitled to deduct in full the input VAT paid. The parent company is actively involved in the management of all subsidiaries by providing them with various main office functions for consideration. That economic activity is fully subject to VAT. No other economic activity is undertaken by the parent company, and it does not declare any income other than that generated by the provision of intra-group services.

11 In 2016, the parent company provided its subsidiaries with management, financial, real estate management, investment, information technology and personnel management services. The parent company received a total of approximately SEK 2.3 million as consideration for the services and declared output VAT on the whole of the consideration.

12 According to the parent company, the amount of consideration was determined by the application of a cost-plus method. The company states that the method consists of remunerating an amount corresponding to the costs incurred by the parent company for purchasing and providing the services and a mark-up for profit. According to the company, it applied an allocation key whereby a specific percentage of its management costs and costs such as those for premises, telephone, information technology, corporate hospitality and travel are considered as attributable to the services provided to the subsidiaries. The company has further indicated that it considered that shareholder costs, such as the costs of closing the accounts, audit and general meeting costs, and the costs of raising capital, were not linked to the services provided and that, consequently, those costs were entirely excluded from the calculation of the consideration. Those costs included the costs associated with a planned new issuance of shares and stock exchange listing.

13 The parent company's own costs during the same year amounted to approximately SEK 28 million. Approximately half of that amount related to acquisition expenses subject to VAT, while the remainder related to VAT-exempt acquisition costs and other VAT-exempt costs, such as wage costs. The company deducted all the input VAT on acquisitions in respect of which VAT had been charged, that is to say, including the tax on the costs of raising capital and shareholder costs.

14 Taking the view that the services had been supplied to the subsidiaries at a price that was less than the open market value, the Tax Agency decided to revalue and increase the taxable amount. According to the Tax Agency, there were no comparable supplies of services on the open market and the taxable amount was therefore set at an amount corresponding to the costs incurred by the company in providing those services. The Agency took the view that all the costs incurred by the company for the year in question, that is to say, approximately SEK 28 million, had to be regarded as attributable to the services supplied and the basis for the parent company's output VAT was therefore set at that amount. That increase was subject to a tax surcharge.

15 The parent company brought an action before the Förvaltningsrätten i Göteborg (Administrative Court, Gothenburg, Sweden), which upheld the appeal and annulled the Tax Agency's decision. By way of justification, the Administrative Court stated the following. The Tax Agency has not demonstrated to the requisite legal standard that the company sold intra-group services below the open market value. It is not self-evident that shareholder costs are to be regarded as costs related to the provision of administrative services. The fact that the company did not declare any income other than that from the intra-group services and that it deducted input VAT on all its purchases has, as such, no bearing on the estimate of the expenditure incurred for the provision of those services. Given that the company is the parent company of a group of companies and that a large proportion of its costs in the year in question were made up of the costs related to a possible stock exchange listing, it is unlikely that the costs incurred by the company for the provision of intra-group services comprised all of the costs which it incurred in that year.

16 The Tax Agency brought an appeal before the Kammarrätten i Göteborg (Administrative Court of Appeal, Gothenburg), which upheld its appeal and upheld the Agency's decision on the following grounds.

17 The Tax Agency has the burden of proving that the consideration charged to subsidiaries is lower than the open market value. Since these are intra-group services, it should be sufficient that the Tax Agency is able to demonstrate that the consideration for those services was lower than the costs of providing them. The provision on the revaluation of the taxable amount is a tax avoidance rule with the aim of uncovering the price manipulation itself. It is therefore reasonable that the valuation of the taxable amount is based on what the taxable person itself has regarded as forming part of the taxable economic activity. The planned new issuance of shares and stock exchange listing were intended to raise finance for further acquisitions of companies and real estate. The raising of capital has therefore benefited the entire group. By requesting the deduction of input tax on all purchases, the company expressed the view that that expenditure was part of its economic activity. In the case of a parent company whose sole activity consists of supplying taxable services to its subsidiaries, input tax cannot be fully deductible on the ground that the expenditure in question forms part of the overheads of the economic activity, while at the same time such a transaction is considered to have no connection with the taxable output transactions of that activity. Thus, all the costs incurred by the parent company are an integral part of the price of the management of the subsidiaries and should be included when determining the open market value of the intra-group services.

Positions of the parties

Aktiebolaget Högkullen

18 Aktiebolaget Högkullen brought an appeal against the judgment of the Administrative Court of Appeal, seeking to have that judgment set aside and the decision of the Administrative Court upheld. It maintains that the consideration received is not lower than the open market value of the services in question and the Tax Agency's decision to revalue the taxable amount is therefore unfounded. The company submits the following.

19 The Tax Agency's contention that the services provided constitute a single joined-up service that is unique to the group and that there is therefore no comparable service on the open market has no basis in the case-law of the Court of Justice. The VAT Directive is based on the principle that each transaction must be regarded as distinct and independent, and the Court of Justice has also recognised that the active management of subsidiaries may consist of various types of services which constitute an economic activity (see, for example, *Marle Participations*, C-320/17, EU:C:2018:537).

20 The services which the company provided to its subsidiaries are not unique to the group and its activities. Outsourcing various functions is common, and all of the services at issue in the present case are of such a nature that they can be procured on the open market from different suppliers. There are therefore comparable services on the open market, and it is possible to set a market price for each separate service. To regard the management of subsidiaries as a joined-up unique service that can only be provided within a group of companies is contrary to the principle of neutrality and implies that the general rule for determining the open market value never applies to the provision of such services.

21 The company applies the cost-plus method to determine the price of the services it provides to its subsidiaries. The methodology is a generally accepted cost-based pricing model with an arm's length mark-up. The arm's length principle is internationally recognised and means that prices and other conditions agreed between closely connected companies in cross-border transactions must correspond to what independent companies would have agreed in the same situation.

22 The company's raising of capital is of no benefit to the subsidiaries and has no connection to the performance of the various main office functions. According to the OECD's guidelines on intra-group services, it is not in line with the arm's length principle to charge shareholder costs to subsidiaries. The Tax Agency constructs a fictitious open market value which will vary considerably from year to year where, as in the present case, a one-off cost occurs that has no connection to the actual cost of producing or providing the services. Because the company adds a mark-up to the cost price of the services, the company's overheads are

taken into account in pricing over time by including them in the 'plus' in the cost-plus method.

23 An open market value that is determined according to the cost-plus method does not conflict with what constitutes an open market value within the meaning of the VAT Directive. There is no legal basis for concluding that the amount of input VAT deduction must be linked to the pricing of a service. In its application of the rules on revaluation, the Tax Agency relies on the case-law of the Court of Justice regarding the right to deduct. That is incorrect, because the rules on revaluation are entirely independent of the rules on the right to deduct. Furthermore, the effect of the Tax Agency's decision is that expenditure which is not subject to input VAT, such as wage costs, is also included in the taxable amount and subject to output VAT. The way the Tax Agency applies the rules on revaluation leads to a result which is disproportionate to the objective pursued by those rules.

The Tax Agency

24 The Tax Agency asserts that the appeal should be dismissed and submits the following.

25 The active management of its subsidiaries by the parent company must be regarded as a single joined-up service, the equivalent of which does not exist between independent parties on the open market. Even if it were to be considered that several separate services are provided, they must be considered to be so specific to the group in question that there are no comparable services on the open market. In intra-group relationships, pricing may in fact be influenced by factors that are irrelevant in the context of a corresponding external transaction. Pricing within a group of companies may therefore deviate from what would have been agreed between independent parties. The content of intra-group services may also be influenced by factors that are irrelevant to external transactions. This leads to the conclusion that if a parent company incurs high costs for producing a service provided to its subsidiaries, then it is not the same type of service as an external supplier could provide; rather the parent company's service is of a different character and contains much more.

26 Where the open market value is calculated on the basis of the costs incurred by the parent company, this should be done in the same way as the taxable amount is determined when services are used for purposes other than those of the business. This means that the cost of providing the service is considered to be the proportion of the fixed and running business costs that relate to the service. If it can be established that the input tax relating to expenditure is deductible on the ground that those costs form part of the overheads of the economic activity, then there is a link between the cost and the output transactions. If such a link exists in the context of the assessment of the right to deduct, then there is a corresponding link in the context of a revaluation. Consequently, input tax cannot be regarded as wholly deductible on the ground that the cost forms part of the overheads of the

economic activity while not being linked to the output transactions in the context of a revaluation.

27 It is clear from the case-law of the Court of Justice that the costs of raising capital may constitute general overheads of the economic activity (*Kretztechnik*, C-465/03, EU:C:2005:320). In the present case, the parent company deducted all input tax relating to its acquisitions, including tax relating to the costs of raising capital and shareholder costs. As the parent company's economic activity consists exclusively of providing services to its subsidiaries, those costs must be considered to have indirectly benefited the subsidiaries.

28 The provisions on the revaluation of the taxable amount were introduced to counter tax evasion and the loss of VAT revenue as a result of price manipulation. In the present case, the parent company deducted the input tax paid in respect of general overheads, but did not take those costs into account in the pricing of the output transactions. The subsidiaries do not have a full right of deduction and would therefore not have been able to deduct all the input tax if they had purchased the services externally or raised the capital themselves. Accepting that way of pricing the services would therefore lead to a loss of tax revenue.

29 The principles that govern income taxation are not applicable in the field of VAT, since they are two separate systems with different objectives and different approaches. The Court of Justice has held that the OECD Model Tax Convention is not relevant for the purposes of interpreting the VAT Directive, since it relates to direct taxation (*FCE Bank*, C-210/04, EU:C:2006:196, paragraph 39). Consequently, even if that way of pricing may be accepted for income tax purposes, it may be necessary to revalue the taxable amount in the context of a VAT assessment.

The need for a preliminary ruling

30 In the present case, it is undisputed that the parent company and its subsidiaries are connected to each other in such a way that it can be assumed that the rules relating to the revaluation of the taxable amount are applicable and that the subsidiaries do not have a full right of deduction of input VAT. Furthermore, Article 80 of the VAT Directive makes revaluation subject to the condition that the consideration provided be lower than the open market value. By this request for a preliminary ruling, the Supreme Administrative Court seeks guidance on how to assess whether that is the case.

31 Under the first paragraph of Article 72 of the VAT Directive, the open market value of a service means the amount the customer of the service would have had to pay a supplier at arm's length in order to obtain the service in question. Under the second subparagraph, if no comparable supply of services can be ascertained, the open market value is to mean an amount which is not less than the full cost of providing the service.

32 The parties to the case disagree as to whether the first paragraph of Article 72 may be applied in order to determine the open market value of services provided by a parent company to its subsidiaries. Aktiebolaget Högkullen asserts that the services provided must each be assessed separately and that corresponding services can be acquired on the open market. By contrast, the Tax Agency maintains that the active management of the subsidiaries by the parent company is a single joined-up service, the equivalent of which does not exist between independent parties on the open market. The Tax Agency also asserts that both the pricing and content of intra-group services are influenced by factors that are irrelevant to external transactions. According to the Tax Agency, a comparable supply therefore cannot be ascertained, irrespective of whether one or more services are considered to have been provided to the subsidiaries.

33 The question whether in this specific case comparable supplies of services actually exist on the open market is fundamentally a question of fact on which the Court of Justice does not rule. The Tax Agency, however, holds the view, in principle, that services provided by a parent company, as an active holding company, to its subsidiaries are, by their very nature, such that no comparable supply of services may be ascertained on the open market. According to the Tax Agency, those cases therefore entail unique services whose open market value cannot be determined in accordance with the first paragraph of Article 72.

34 The Tax Agency's position is based on the previous case-law of the Supreme Administrative Court. In the case HFD 2014 ref. 40, the court held that a prerequisite for revaluation of the taxable amount is that the Tax Agency show that the consideration is lower than the open market value. Furthermore, the court held that, in the case of intra-group transactions, the Tax Agency may discharge its burden of proof by demonstrating that the consideration is lower than the cost of providing the services, without first having to show that there are no comparable services provided by external service providers. The court justified this by the fact that pricing in intra-group transactions may be influenced by factors that are irrelevant in the context of a corresponding external transaction and thus may deviate from what would have been agreed between independent parties.

35 The Supreme Administrative Court considers it necessary for the Court of Justice to clarify whether it is compatible with Articles 72 and 80 of the VAT Directive to assume, as the Tax Agency did, that there are no comparable supplies of services on the open market as regards the type of services at issue in the present case. The question which arises is therefore whether it is compatible with the VAT Directive, with reference to the uniqueness of those services, always to determine the open market value on the basis of the alternative rule in the second paragraph of Article 72.

36 Under the second paragraph of Article 72, the open market value is an amount that is not less than the full cost to the taxable person of providing the service. The parties to the case also disagree as to how that provision is to be understood.

According to Aktiebolaget Högkullen, the cost-plus method it used to calculate the consideration results in the latter being at least equal to the company's costs of providing the services. The Tax Agency maintains that all the fixed and variable costs of the parent company constitute costs for the provision of the services.

37 In support of its argument, the Tax Agency refers to the fact that, in the present case, the parent company's sole economic activity consisted of the active management of its subsidiaries and that it deducted all input tax charged on its own expenditure, including tax relating to the costs of raising capital and shareholder costs. According to the Tax Agency, that means that the total expenditure of the parent company must be regarded as constituting the cost incurred by it in providing the services.

38 In order for the taxable amount to be set at an amount higher than the consideration, the Tax Agency must show that the consideration is lower than the open market value. In the view of the Supreme Administrative Court, it is not clear whether, in a situation such as that at issue in the present case, when determining the open market value such a link must be made to the deduction of input tax, as the Tax Agency did. Consequently, the Supreme Administrative Court seeks a ruling from the Court of Justice on whether it is compatible with Articles 72 and 80 of the VAT Directive to consider that, where a parent company's sole activity consists of the active management of its subsidiaries and the parent company has deducted all of the input VAT paid on its expenditure, the total expenditure of the parent company, including the costs of raising capital and shareholder costs, constitutes the cost incurred by the company in providing the services to the subsidiaries.

39 According to the case-law of the Court of Justice, Article 80 must be interpreted restrictively and Member States may not, on the basis of that article, provide that the taxable amount is to be the open market value in situations other than those set out therein (see, for example, *Balkan and Sea Properties and Provadinvest*, Joined Cases C-621/10 and C-129/11, EU:C:2012:248, paragraphs 45 and 51). The Court of Justice has not, however, examined the questions at issue in the present case concerning the revaluation of the taxable amount in respect of intra-group services and the earlier case-law does not, in the Supreme Administrative Court's view, provide sufficient guidance to determine how the questions should be answered. It is therefore necessary to obtain a preliminary ruling from the Court of Justice.

Questions

40 In the light of the foregoing, the Supreme Administrative Court requests an answer to the following questions.

Question 1: When applying national provisions on the revaluation of the taxable amount, is it compatible with Articles 72 and 80 of the VAT Directive, where a parent company provides its subsidiaries with services of the kind at issue in the present case, always to regard those services as unique services whose open

market value cannot be determined by means of a comparison such as that provided for in the first paragraph of Article 72?

Question 2: When applying national provisions on the revaluation of the taxable amount, is it compatible with Articles 72 and 80 of the VAT Directive to consider that the total expenditure of a parent company, including the costs of raising capital and shareholder costs, constitutes the cost incurred by the company in providing services to its subsidiaries, where the parent company's sole activity consists of the active management of its subsidiaries and the parent company has deducted all the input VAT paid on its acquisitions?