Case C-641/21

Request for a preliminary ruling

Date lodged:

20 October 2021

Referring court:

Bundesfinanzgericht (Austria)

Date of the decision to refer:

11 October 2021

Appellant:

Climate Corporation Emissions Trading GmbH

Respondent authority:

Finanzamt Österreich

[…]

BUNDESFINANZGERICHT (FEDERAL FINANCE COURT)
[…]

REPUBLIC OF AUSTRIA

[…]

Request for a preliminary ruling under Article 267 TFEU

Parties to the main proceedings before the Federal Finance Court, […] Case RV/7102167/2013:

- Appellant:

  Climate Corporation Emissions Trading GmbH, […] 2500 Baden, Austria; […]

- Respondent authority:

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Finanzamt Österreich (Tax Office, Austria), […] 1000 Vienna, Austria (as the successor of the Tax Office, Baden Mödling, since 1 January 2021).

ORDER

In the appeal proceedings of Climate Corporation Emissions Trading GmbH […] concerning the appeal of 27 February 2012 against the 2010 turnover tax assessment notice issued by the Tax Office, Baden Mödling, on 27 January 2012, the Federal Finance Court […] has made the following **order**:

The following question is referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

Is Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008, to be interpreted as meaning that the national authorities and courts must regard the place of supply of a service, which, under the written law, is formally located in the other Member State, in which the recipient of the supply is established, as being within the national territory if the domestic taxable person supplying the service should have known that, in supplying it, he or she was participating in value added tax evasion committed in the context of a chain of supplies?

Grounds

(1) Facts

The registered office of Climate Corporation Emissions Trading GmbH ('Climate GmbH') is located in Austria. From 1 to 20 April 2010, Climate GmbH transferred greenhouse gas emission allowances, for consideration, to Bauduin Handelsgesellschaft mbH ('Bauduin GmbH'), having its registered office in Germany (Hamburg), which was a 'buffer company', that is to say, a participant in a value added tax (VAT) carousel fraud. Climate GmbH should have known that those greenhouse gas emission allowances would subsequently be used to evade VAT in a Member State other than Austria. Climate GmbH would have been expected not to sell greenhouse gas emission allowances to Bauduin GmbH, in order to prevent such VAT evasion.

Bauduin GmbH – like Climate GmbH – was to be categorised as a taxable person within the meaning of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

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(2) Previous and further course of the procedure

By the 2010 turnover tax assessment notice contested before the Federal Finance Court, The Tax Office, Baden Mödling, categorised the transfers, for consideration, of greenhouse gas emission allowances from Climate GmbH to Bauduin GmbH as taxable supplies of goods which do not fall under the tax exemption for intra-Community supplies because Bauduin GmbH, as a 'missing trader', was a component of a fraudulent VAT carousel and Climate GmbH knew or should have known that its supplies would be used for acts of VAT evasion.

Climate GmbH objects to the categorisation of the transfers of emission allowances as supplies of goods and disputes the assertion that it or its managing directors knew or should have known about the acts of VAT evasion. It submits that it took all necessary measures to prevent the greenhouse gas emission allowances that it sold to Bauduin GmbH from being involved in acts of VAT evasion.

The Federal Finance Court takes the view that that is not true: although Climate GmbH did not know that the allowances that it sold to Bauduin GmbH were involved in acts of VAT evasion, it should have known that that was the case.

In accordance with the case-law of the Court of Justice of the European Union (judgment of 8 December 2016, C-453/15), transfers of greenhouse gas emission allowances are to be categorised as services. The Federal Finance Court can amend the contested assessment notice in any way, so it must take its decision on the premiss that the transfers of greenhouse gas emission allowances are to be categorised as services ('other supplies', according to the terminology used in Austrian national law) and not as supplies of goods.

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(3) Relevant provisions

(3.1) National (domestic) law

For 'other supplies' (a concept of national law, for which EU law uses the term 'services') made to a 'trader' (a concept of national law, for which EU law uses the term 'taxable person') after 31 December 2009, the place of supply is determined as follows in Paragraph 3a(5) and (6) of the Austrian Umsatzsteuergesetz 1994 (1994 Law on turnover tax; 'the Austrian UStG'), in the version published in BGBl. I 52/2009:

'(5) For the purposes of subparagraphs 6 to 16 and Article 3a, the following shall apply:

1. a trader shall be any trader within the meaning of Paragraph 2; a trader who carries out also non-taxable transactions shall be regarded as a trader in respect of all other supplies made to him or her;

2. a legal person carrying on non-business activities who is identified for turnover tax purposes shall be regarded a trader;

3. a person or association of persons that does not fall within the scope of points 1 and 2 shall be regarded as a non-trader.

(6) Without prejudice to subparagraphs 8 to 16 and Article 3a, other supplies made to a trader within the meaning of points 1 and 2 of subparagraph 5 shall be deemed to be made at the place from which the recipient carries on his or her business. If, however, the other supply is made at the fixed establishment of a trader, the location of the fixed establishment shall be decisive.'

(3.2) EU law

The national law, which uses the term 'Umsatzsteuer' (turnover tax) for the tax at issue, and the enforcement of that law by the authorities and courts of the Member State must comply with the provisions of EU law on that tax, which is referred to as 'value added tax' under EU law.

The following provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC, are relevant in that regard:

'Article 44

The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such a place of establishment or fixed establishment, the place of supply of services is the place where the taxable person who receives such services has his permanent address or usually resides.'

'Article 196

VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.'

Council Regulation (EC) No 1777/2005 of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax was '*binding in its entirety and directly applicable in all Member States*', and it was not until 2011 that it was repealed, with effect from 1 July 2011, by Article 64 of Council Implementing Regulation (EU) No 282/2011 of

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15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax ('the VAT Implementing Regulation'), read in conjunction with Article 65 thereof. Consequently, Regulation (EC) No 1777/2005 is applicable to the transactions of April 2010 from a temporal point of view, even if, from a formal point of view, April 2010 is no longer covered by Directive 77/388/EEC, but by Directive 2006/112/EC on the common system of value added tax. Although Articles 4 to 12 of Regulation (EC) No 1777/2005 contain various detailed provisions on the place of a taxable transaction, they are not at all related to the matters at issue in the present case.

The VAT Implementing Regulation is not applicable to the transactions in April 2010 *ratione temporis*, as it did not enter into force until 12 April 2011 and has only been applicable since 1 July 2011.

(4) Explanation of the question referred

(4.1) Relevance of the question referred

According to the wording of the national legislation, the place where the services at issue were supplied by Climate GmbH to Bauduin GmbH between 1 and 20 April 2010 is, in accordance with the basic rule for 'B2B' (supplies from one taxable person to another taxable person) – that is to say, in accordance with Paragraph 3a(6) of the Austrian UStG – in Germany. Consequently, the services at issue are not taxable in Austria under national written law; in other words, they are not subject to Austrian turnover tax (= VAT) under national written law.

In accordance with Paragraph 3a(2) of the German Umsatzsteuergesetz (Law on value added tax; 'the German UStG'), the place of transfer of greenhouse gas emission allowances to a trader (= 'taxable person' in the terminology used in Directive 2006/112/EC) is the place from which the recipient carries on his or her business. In the present case, therefore, that place was in Germany.

In accordance with Paragraph 13b(1) of the German UStG, the taxable person in respect of the 'other supplies' (services) of a trader established in Austria which are taxable in Germany is the trader receiving the supply. In the present case, therefore, Bauduin GmbH was the taxable person in respect of German turnover tax.

Therefore, German domestic law – like Austrian domestic law – complies with EU law.

According to the wording of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Directive 2008/8/EC, the place of supply of the services at issue which were provided by Climate GmbH to Bauduin GmbH between 1 and 20 April 2010 is Germany, in accordance with the general rule for 'B2B' (supplies from one taxable person to

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another taxable person), that is to say, in accordance with Article 44 of the directive, as amended. Consequently, the services at issue are not taxable in Austria under EU written law; in other words, they are not subject to Austrian turnover tax under EU written law.

According to the answer given, in reply to a question referred for a preliminary ruling, in the judgment of the Court of 18 December 2014, *Schoenimport 'Italmoda'*, C-131/13, it is for the national authorities and courts to refuse a taxable person, in the context of an intra-Community supply [of goods], the benefit of the rights to deduction of, exemption from or refund of VAT, even in the absence of provisions of national law providing for such refusal, if it is established, in the light of objective factors, that that taxable person knew, or should have known, that, by the transaction relied on as a basis for the right concerned, it was participating in VAT evasion committed in the context of a chain of supplies.

In that judgment of the Court, a further question referred for a preliminary ruling was answered to the effect that a taxable person who knew, or should have known, that, by the transaction relied on as a basis for rights to deduction of, exemption from or refund of VAT, that person was participating in evasion of VAT committed in the context of a chain of supplies [of goods], may be refused the benefit of those rights, notwithstanding the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that taxable person has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefiting from those rights.

If the supplies at issue had consisted of supplies of goods and not – as is the case here – of services, the present case would have to be assessed in accordance with the Court's judgment in *Schoenimport 'Italmoda'*, to the effect that Climate GmbH would in that case have to be denied the tax exemption in respect of the intra-Community supplies. In line with the Court's order of 14 April 2021, *HR* v *Finanzamt Wilmersdorf*, C-108/20, that outcome would not be precluded by the fact that Climate GmbH did not actively participate in the tax evasion.

The decision of the Federal Finance Court depends on whether the abovementioned answers to questions referred for a preliminary ruling in the judgment of the Court of 18 December 2014, *Schoenimport 'Italmoda'*, C-131/13 are to be applied *mutatis mutandis* to the cross-border services at issue; in other words, whether, for the purposes of determining the Austrian VAT, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, taking its entire rationale into account, is to be interpreted in such a way that, contrary to the wording of Article 44 thereof (as amended by Directive 2008/8/EC) and contrary to the wording of Paragraph 3a of the Austrian UStG, the place of supply is to be regarded as being in Austria in the circumstances of the present case.

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(4.2) The question referred

In the area of 'B2B', the comparison of an intra-Community supply of goods, which was the basis of the judgment of the Court of 18 December 2014, *Schoenimport 'Italmoda'*, C-131/13, with a cross-border service (supplied by a taxable person established in one Member State to a taxable person established in another Member State) shows that there are both similarities and differences between them:

Similarities:

Intra-Community supplies of goods and cross-border services within the EU involve two Member States in each case. As a general rule, the different provisions on those two types of supplies have the same effect in the area of 'B2B', namely that tax liability in respect of the supplies arises only in the Member State in which the recipient of the supply is established. As a general rule, that tax liability falls on the recipient of the supply, either as a tax on the intra-Community acquisition or as a tax which is passed on to the recipient of the supply (reverse charge).

Those similarities might suggest that, with regard to cross-border services, Directive 2006/112/EC (as amended by Directive 2008/8/EC) must be interpreted by analogy with the judgment of the Court of 18 December 2014, *Schoenimport 'Italmoda'*, C-131/13.

Differences:

In the case of intra-Community supplies of goods from one taxable person to another, the place of supply is, as a general rule, the place where the supplier is established, that is to say, the place where the goods are located when the right of disposal is transferred or the place where the transport of the goods to the recipient begins.

By contrast, in the case of a cross-border service supplied by one taxable person to another, the place of supply is, as a general rule, the place where the recipient of the supply is established.

In the case of intra-Community supplies of goods, the same transaction meets, in the area of 'B2B', the criteria for two taxable events, namely the intra-Community supply and the intra-Community acquisition, whereby, as a general rule, double taxation of the transaction is prevented by the tax exemption of the former.

By contrast, only one taxable event is provided for in respect of cross-border services. The acquisition of a cross-border service does not constitute a taxable event. Where appropriate, the tax liability for the supply of the service is transferred from the supplier to the recipient of the supply (reverse charge).

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In the case of intra-Community supplies of goods, the State in which the supplier is established has a right of taxation, which, as a general rule, is neutralised by the tax exemption of the intra-Community supply.

By contrast, in the case of a cross-border service which is taxable at the place where the recipient of the supply is established, the State in which the supplier is established does not have a right of taxation, with the result that tax exemption by that State is not necessary.

Those differences might suggest that, with regard to cross-border services, Directive 2006/112/EC (as amended by Directive 2008/8/EC) is not to be interpreted by analogy with the judgment of the Court of 18 December 2014, *Schoenimport 'Italmoda'*, C-131/13.

Overall, the correct interpretation of EU law does not appear to be so obvious as to leave no scope for any reasonable doubt (see judgment of the Court of Justice of 4 October 2018, C-416/17, paragraph 110).

The question set out in the introduction to the present order is therefore referred to the Court for a preliminary ruling under Article 267 TFEU.

[…]

[Statements regarding the national procedure and rights of appeal].

[…]

[Statements regarding procedural aspects of the preliminary ruling procedure before the Court, the protection of personal data, as well as costs and the possibility of legal aid].

[…]

Vienna, 11 October 2021

[…]

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