Anonymised version

Case C-596/20

Request for a preliminary ruling

Date lodged:

12 November 2020

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

28 September 2020

Applicant:

DuoDecad Kft.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Resources Directorate of the National Tax and Customs Administration, Hungary)

In the administrative-law proceedings initiated with a view to settling the tax dispute [OMISSIS] pursued at the request of DuoDecad Kft. ([OMISSIS] Budapest [OMISSIS]), applicant, against the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Resources Directorate of the National Tax and Customs Administration, Hungary) ([OMISSIS] Budapest [OMISSIS]), defendant, the Fővárosi Törvényszék (Budapest High Court, Hungary) has made the following

Order

This court hereby institutes preliminary ruling proceedings before the Court of Justice of the European Union and refers the following questions to that court:

1. Must Articles 2(1)(c), 24(1) and 43 of Council Directive 2006/112 be interpreted as meaning that, since the acquirer of a know-how licence — a

company established in a Member State of the European Union (in the case of the dispute in the main proceedings, Portugal) — does not provide the services available on a website to end users, it cannot be the recipient of the service of technical support for that know-how that is provided by a taxable person established in another Member State (in the case of the dispute in the main proceedings, Hungary) as a subcontractor, that service being provided, rather, by the taxable person to the grantor of the know-how licence established in the latter Member State, in circumstances in which the acquirer of the licence:

a) had rented offices in the first Member State, IT and other office infrastructure, its own staff and extensive experience in the field of e-commerce, as well as an owner with extensive international connections and a qualified e-commerce manager;

b) had obtained know-how reflecting the processes for operating the websites and making updates to them, and issued opinions on, suggested modifications to, and approved those processes;

c) was the recipient of the service that the taxable person provided on the basis of that know-how;

d) regularly received reports on the services provided by the subcontractors (in particular, on website traffic and payments made from the bank account);

e) registered in its own name the internet domains allowing access to the websites via the internet;

f) was listed on the websites as a service provider;

g) took steps itself to preserve the popularity of the websites;

h) itself concluded, in its own name, the contracts with partners and subcontractors that were necessary in order to provide the service (in particular, with banks offering payment by bank card on the websites, with creators providing content accessible on the websites and with webmasters promoting that content);

i) had a complete system for receiving revenue from providing the service in question to end users, such as bank accounts, full and exclusive powers of disposal over those accounts, an end user database enabling end users to be invoiced for that service and its own invoicing software;

j) indicated on the websites its own headquarters in the first Member State as the physical customer service centre; and

k) is a company independent of both the grantor of the licence and the Hungarian subcontractors responsible for carrying out certain technical processes described in the know-how,

given also that: i) the circumstances set out above were confirmed by the relevant authority in the first Member State, in its capacity as the appropriate body to establish the presence of those objective and externally verifiable circumstances; ii) the fact that the company in the other Member State could not access a payment service provider able to guarantee receipt of payments by bank card on the website, with the result that the company established in that Member State never provided the service available on the websites, either before or after the period under examination, constituted an objective obstacle to the provision of that service in that other Member State via the websites; and iii) the company acquiring the licence and its related undertakings derived a profit from the operation of the website that was higher overall than the difference between applying the rate of VAT in the first Member State and in the second respectively?

2. Must Articles 2(1)(c), 24(1) and 43 of the VAT Directive be interpreted as meaning that, since the grantor of the know-how licence — a company established in the other Member State – provides the services available on a website to end users, it is the recipient of the service of technical support for that know-how provided by the taxable person as a subcontractor, that service not being provided by the taxable person to the acquirer of the licence, established in the first Member State, in circumstances in which the company granting the licence:

a) had resources of its own consisting solely of a rented office and a computer used by the company manager;

b) had as its own employees only a manager and a legal adviser who worked a few hours a week on a part-time basis;

c) had as its only contract the know-how development contract;

d) ordered that the domain names that it owned be registered by the acquirer of the licence in its own name, in accordance with the contract concluded with the latter;

e) never appeared as the provider of the services in question in dealings with third parties, in particular end users, banks offering payment by bank card on the websites, creators of content accessible on the websites and webmasters promoting that content;

f) has never issued any supporting documentation in relation to the services available on the websites, other than the invoice for the licence fees; and

g) did not have a system (such as bank accounts and other infrastructure) for receiving revenue from the service provided via the websites;

given also that, in accordance with the judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832), the fact that the manager and sole shareholder of the company granting the licence is the creator of the know-how and, moreover, that that person exercises influence or control over the development and exploitation of that know-how and over the supply of the services based on it, with the result that the natural person who is the manager and owner of the company granting the licence is also the manager and/or owner of those subcontracted commercial companies (and, therefore, of the applicant), which work together to provide the service, as subcontractors, on behalf of the acquirer of the licence and perform the abovementioned functions for which they are responsible, does not appear to be decisive in itself?

[OMISSIS] [matters of domestic procedural law]

Grounds

I. Summary of the factual background

On 8 October 2007, KT and twelve employees of Jasmin Media Group Kft. formed the applicant company, the main activity of which is computer programming. Up until 28 February 2011, KT gradually acquired the equity of the minority shareholders, with the exception of that held by HP. The applicant employs professionals with many years of experience and, owing to its stable technical background, is considered to be the market leader in the transmission of multimedia content over the internet. Its main customer was the Portuguese company Lalib Lda., to which it issued invoices for the provision of support, maintenance and construction services amounting in total to EUR 8 086 829.40 between July and December 2009 and for the whole of 2011.

The applicant was subjected to a tax inspection carried out by the Nemzeti Adó- és Vámhivatal Kelet Budapesti Adó- és Vámigazgatósága Társas Vállalkozások Ellenőrzési Főosztály I. Társas Vállalkozások Ellenőrzési Osztály 6. (Commercial Company Inspection Unit No 6 of Commercial Company Inspection Department No 1 of the East Budapest Tax and Customs Directorate, which is part of the National Tax and Customs Administration, Hungary) in accordance with Article 89(1)(a) of the az adóigazgatási rendtartásról szóló 2017. évi CLI. törvény (Law CLI of 2017 regulating the administration of tax). That inspection was concerned with value added tax and related to the second half of 2009 and the whole of the 2011 financial year. As a result of the inspection, the first-tier tax administration, by order [OMISSIS] of 10 February 2020 and taking into account the applicant's observations [OMISSIS], assessed as being payable by the applicant a difference of HUF 458 438 000, classified as a tax debt, and further imposed on the applicant a tax fine of HUF 343 823 000 plus default interest of HUF 129 263 000.

Following the appeal lodged by the applicant against the first-tier order, the defendant confirmed the order of the first-tier tax administration by order [OMISSIS] of 6 April 2020.

The Portuguese company Lalib Gestao e Investimentos LDA ('Lalib') was formed on 16 February 1998 in accordance with Portuguese law and, during the period under examination, its principal activity was the provision of electronic entertainment services.

The orders of the defendant tax administration were based on a finding, reached by that administration during the administrative procedure, that the actual recipient of the services provided to Lalib by the applicant was not Lalib but WebMindLicenses ('WML').

According to the account given in the application brought by the applicant against the defendant's orders, the applicant's claim is based on its view that the place of supply of the services provided to Lalib should be declared to be Portugal, since all of the conditions laid down by the Court of Justice in this regard are met. In its view, the defendant's order is also erroneous in relation to the substance of the supply of electronic services in question, that is to say in relation to the supply of services to users, which it wrongly identifies as being the direct technical operation of the websites in question, and thus fails to take into consideration the adequacy of the material and human resources required for that purpose and the fact that Lalib actually has available to it all of the resources necessary to provide the service in question. The order does not correctly assess the substance of the supply of electronic services. The applicant claims that, in common with other partner undertakings, it supplied support services directly to Lalib and not to WML. According to the applicant's claim, Lalib's conduct in matters extending beyond routine tasks not governed by know-how is also active and positive: it inspects, supervises and gives instructions to undertakings in the Docler group, and, therefore, to the applicant too. As regards the contracts concluded with Lalib, neither WML nor KT participated as recipients, with the result that they did not address to the applicant requests falling to be made by the recipient of the services and did not give instructions in this regard either. So far as concerns the activity relating to the supply of services, Lalib exercised control over users and received the necessary authorisations from their representatives. The applicant claimed that, in the course of the proceedings against WML, the [Nemzeti Adó- és Vámhivatal Kiemelt Adózók Adóigazgatósága] (Tax Directorate for Major Taxpayers of the National Tax and Customs Administration) asked the Portuguese authorities to clarify the facts in relation to the provisions contained in the judgment given in that case. In their response to that international request, the Portuguese authorities clearly stated that Lalib was established in Portugal, that, during the period under consideration, it actually performed an economic activity on its own account and at its own risk and that it had all the technical and human resources necessary to exploit the knowledge acquired at international level. The applicant considers that taxing WML on the transactions in question was contrary to law and that Lalib was the true party to the contract. The place of supply of the

service was not in Hungary, since this was objectively precluded by the lack of any financial institutions allowing payment to be made by bank card on websites for adults. This is why, prior to the collaboration with Lalib, the online service provider, which, at that time, was still an undertaking affiliated to the Docler group, was also located abroad. In any event, it was not WML but Lalib which presented itself to the outside world as being the supplier of the services in question. Lalib concluded the contracts in its own name, held the database of customers paying for the services in question and was the only undertaking to have at its disposal the revenue from the provision of those services. In any event, Lalib exercised control over the development of the know-how and made decisions about its implementation. There was no indication of any physical customer service facility or any office in Hungary, only evidence of Lalib's registered office there. The applicant takes the view that Articles 2(1)(c), 24(1) and 43 of Directive 2006/112 must be interpreted and applied in order to determine the place of supply of the service concerned.

According to the defendant, the declaration of liability to tax that is contained in its orders was well founded. It argued that, in the previous proceedings, the judgment at first instance stated that the tax administration had to prove that the service in question, namely the operation of a website, was not provided by Lalib in Portugal, but was actually provided by the defendant in that case in Hungary, and that the tax administration had to prove this on the basis of objective facts, which it did by reference to the facts of the case in those proceedings. The tax administration brought new proceedings against WML in which it claimed that the service in question was provided not by Lalib but by WML from Hungary, and that the licence agreement in question was fictitious. In its view, the present proceedings do not meet the conditions of fact and law necessary to support a reference for a preliminary ruling to the Court of Justice. It further expressed the opinion that, as regards the questions raised at the applicant's request, the Court of Justice had already given a ruling in this regard and had held that the assessment of the circumstances was a matter for the national court making the reference. Articles 2(1)(c), 24(1) and 43 of the Directive have already been interpreted by the Court of Justice. In the proceedings instituted at the request of WML, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary), acting on the applicant's request, had brought before the Court of Justice, with a view to obtaining an interpretation of the provisions in question, preliminary ruling proceedings in which the latter clearly defined the criteria against which the national court may adjudicate on the place of supply of the service to end users. In its ruling, the Court of Justice specifically interpreted the aforementioned provisions of EU law.

II. Description of national law

So far as concerns the rules relating to the place of performance that are contained in the az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax), both the parties to the proceedings and the

referring court take the view that [the rules relating to the place of performance contained in that Law] are in conformity with the provisions of the VAT Directive, which states that, in the case of supplies of services to a person who is not a taxable person, the place of supply of services is to be the place where the service provider is established.

Nonetheless, the referring court observes that, in order to answer the question of who may be regarded as being the provider of the service, it is necessary to examine, first of all, the contractual relationship between the recipient and the provider of that service, although, in the light of the judgment given by the Court of Justice in the previous proceedings to which WML was a party, **the Portuguese and Hungarian tax administrations**, in their capacity as tax administrations of Member States, as determined in that judgment, **took different positions on the place in which the service was actually provided**.

III. Reasons why a reference for a preliminary ruling is necessary

According to the legal reasoning followed by the referring court, the dispute between the parties to these proceedings cannot be disposed of without an interpretation of EU law, in particular Articles 2(1)(c), 24(1) and 43 of Council Directive 2006/112, and without the application of that interpretation by the national court [to the present case]. In the context of the facts of the main proceedings, it may be noted that the Portuguese and Hungarian tax administrations, as tax administrations of Member States, have treated the same economic transaction differently from the point of view of tax. Both Member States have indicated that they are entitled to levy the VAT due on the transaction in question.

[OMISSIS] [repetitive reasoning] The Court of Justice has already examined the legislation of several Member States in the light of Articles 2(1)(c), 24(1) and 43 of Council Directive (EC) 2006/112, and interpreted the provisions of the VAT Directive relating to the supply of services in the judgment in *WML*. Nonetheless, the referring court considers that, in addition to that interpretation, the present case calls for a further interpretation, given that, taking into account the judgments of the Court of Justice relating to the interpretation of those same provisions of EU law, the Portuguese and Hungarian tax administrations have arrived at difference conclusions.

The predecessor to this dispute is found in the request for a preliminary ruling that was made by the court hearing the administrative-law action which had been brought by WML in connection with part of financial year (FY) 2009 and FYs 2010 and 2011, the Court of Justice having ruled on that reference for a preliminary ruling in Case C-419/14. In that case, the Court of Justice held that it is incumbent on the referring court to analyse all the circumstances of the main proceedings in order to determine whether the agreement concluded between the parties constituted a wholly artificial arrangement concealing the fact that the

services at issue were not actually supplied by the company acquiring the licence, but were in fact supplied by the company granting it, and determined the circumstances that must form the subject of its analysis; in the light of that ruling, it may be said that the Court of Justice attached decisive importance to whether Lalib possessed premises, infrastructure and staff in Portugal and whether it engaged in the economic activity in its own name and on its own behalf, under its own responsibility and at its own risk, and is therefore the recipient of the applicant's services.

In that context, the question of the criteria against which a national court in a Member State must assess the circumstances obtaining when determining the place of supply of services provided via the websites at issue, and, correlatively, the existence of any abuse of rights, is of decisive importance in the present proceedings. It is appropriate to ask whether the place of supply of the service to end users may be located in Hungary, and, therefore, whether the transaction between the applicant and Lalib may be regarded as being wholly artificial, notwithstanding that Lalib was the centre of the complex network of contracts and services essential to the provision of that service, and that it provided the conditions necessary for its supply, in the form of its own databases and IT software and suppliers that were either third parties or members of the Lalib group or of the applicant's group of undertakings, and thus took on itself the legal and economic risk inherent in the supply of that service, and notwithstanding even the fact that subcontractors affiliated to the know-how proprietor's group of undertakings, including the applicant, took part in the process of technical implementation of the know-how, and that the applicant undertaking's ultimate owner — which was also the manager and ultimate owner of the proprietor of the know-how — had an influence on the operation of the know-how. The question is how to interpret the fact that Lalib possessed premises, infrastructure and staff in Portugal. The courts that heard the previous proceedings instituted at the request of WML instructed the tax administration, when investigating the actual place of supply of the service, to question and involve the Portuguese tax administration. The Portuguese tax administration confirmed that Lalib did indeed carry on an economic activity in Portugal and that it did so on its own account and at its own risk. Given that, in the proceedings before the Court of Justice in *WML*, Portugal submitted observations and its representative appeared in person and attended the hearing, it is clear that that the Portuguese tax administration was familiar with the essential content of the judgment in *WML*. It nonetheless maintained its position with respect to the matter of Lalib's establishment in Portugal. Notwithstanding the judgment in *WML*, the Hungarian and Portuguese tax administrations maintained their previous different positions. The referring court therefore considers that the judgment in *WML* is not sufficiently clear with respect to the legal issue applicable to the present case and that that judgment must therefore be interpreted and clarified.

As the Court of Justice had already held in paragraph 51 of the judgment in *KrakVet*, where they find that the same transaction has been the object of a different tax treatment in another Member State, the courts of a Member State

before which a dispute raises issues involving an interpretation of provisions of EU law and requiring a decision by them have the power, or even – depending on whether there is a judicial remedy under national law against their decisions – the obligation, to refer a request for a preliminary ruling to the Court of Justice. It is common ground that, in judgments relating to permanent establishment, the Court of Justice has also given definitive rulings on the question of which of two Member States has taxing powers (judgments given in Cases C-168/84, *Grunter Berkholz*, and C-231/94, *Faaborg-Gelting Linien*). In the present case, in which two Member States classify a single transaction differently for tax purposes, the referring court considers itself bound to make the present reference for a preliminary ruling to the Court of Justice. Given that that transaction is a cross-border transaction, its assessment constitutes an important question of principle at EU level, not only from the point of view of determining the place of liability to tax, but also from the point of view of the free movement of services. In the light of the foregoing considerations, the referring court has instituted preliminary ruling proceedings before the Court of Justice on account, principally, of the aforementioned different tax classifications effected by the tax authorities of the Member States in question. By the questions raised, the referring court seeks the guidance of the Court of Justice as to whether, in the context of the transaction forming the subject of this dispute, the declaration of liability to tax made by the Portuguese tax administration or that made by the Hungarian tax administration is lawful, and as to which of the two Member States is the proper place for the taxation of that transaction. In that regard, it asks about the importance or otherwise of the criteria given.

Given that VAT is a harmonised tax in the European Union, cooperation between the Member States has an importance which must not only be formal but must also be reflected in acceptance of the official position of foreign tax authorities. The outcome of the dispute between the tax administrations of the two Member States must not be that those party to the transaction remain subject to double taxation by virtue of the fact that two Member States adopt a different position in relation to the authenticity of the economic transaction and the place in which the service was supplied. After all, the provisions that determine the connecting factor for the purposes of the taxation of supplies of services have as their objective to avoid conflicts of competence that may give rise to double taxation, which would be contrary to the basic concept of the uniform system of VAT.

[OMISSIS] [OMISSIS] [matters of domestic procedural law]

Budapest, 28 September 2020 [OMISSIS]
[OMISSIS]

[OMISSIS] [signatures]