Case C-98/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 February 2021

Referring court or tribunal:

Bundesfinanzhof (Germany)

Date of the decision to refer:

23 September 2020

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

Finanzamt (Tax Office) R

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

W-GmbH

Subject matter of the main proceedings

Value added tax – Directive 2006/112 – Right of a managing holding that supplies taxable output services to subsidiaries, to deduction even for services that it obtains from third parties and contributes to the subsidiaries in return for the granting of a share in the general profit, even though the obtained input services are directly and immediately linked to the (largely) tax-exempt activities of the subsidiaries and not to the holding's own transactions – exclusion of deduction on the grounds of abuse of rights or conflict with the system

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Under circumstances such as those in the main proceedings, is Article 168(a) in conjunction with Article 167 of Council Directive 2006/112/EC of

28 November 2006 on the common system of value added tax to be interpreted in such a way that a managing holding that supplies taxable output services for subsidiaries is entitled to deduction, also for services that it obtains from third parties and contributes to the subsidiaries in return for the grant of a share in the general profit, even though the obtained inputs are not directly and immediately linked to the holding's own transactions but instead to the (largely) tax-exempt activities of the subsidiaries, the obtained input services are not included in the price of the taxable transactions (supplied to the subsidiaries), and they do not form part of the general cost components of the holding's own economic activity?

2. If Question 1 is answered in the affirmative: Does it constitute abuse of rights in the sense of the case-law of the Court of Justice of the European Union, if a managing holding is involved as an 'intermediary' in obtaining services for subsidiaries in such a way that it obtains services itself for which the subsidiaries would have no entitlement to deduction if services were obtained directly, contributes these services to the subsidiaries in return for participation in its profit, and then claims full deduction on the basis of the inputs on the grounds of its position as a managing holding; or can acting as an intermediary in this way be justified on grounds that fall outside the scope of tax law, even though full deduction is in itself in conflict with the system and would result in a competitive advantage for holding structures over single-tier companies?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 2, 167 and 168(a)

Provisions of national law relied on

Umsatzsteuergesetz (German Law on turnover tax, 'UStG')

Summary of the facts and proceedings

1 The applicant carries out the purchase, management and re-utilisation of its own property, as well as project planning, renovation, and preparation of building projects of all different types. Its shareholders in 2013, the year under dispute, were A and B, each with a stake of 50% (simultaneously sole managers).

2 The applicant held a stake in the limited partnerships under German law, X-KG and Y-KG, as a limited partner. Both companies built properties and sold the individual dwelling units predominantly free of value added tax.

3 During the year under dispute, stakes in X-KG were held by Q, the management company with limited liability under German law (Q Verwaltungs-GmbH) as the general partner, and by the applicant (with 94% of the shares) and Z, the limited partnership under German law (Z-KG) (with 6% of the shares) as limited partners. The applicant's investment was EUR 940, and that of Z-KG was EUR 60. Q Verwaltungs-GmbH was not required to make any investment and does not have any capital share; it does not share in any profit or loss and does not possess any voting rights. The managing directors of Q Verwaltungs-GmbH are B and C. Neither A nor B nor closely associated persons hold a stake in Z-KG.

4 On 31 January 2013, it was agreed that Z-KG would pay a premium of EUR 600 000 as a shareholder contribution and that the applicant would provide services free of charge worth at least EUR 9.4 million for two building projects of X-KG. The applicant provided these services partly with its own personnel and its own machinery, and partly with assistance from other companies.

5 Furthermore, the applicant and X-KG agreed on 31 January 2013 that the applicant would provide accounting and management services for X-KG in connection with the two construction projects in the future in return for payment.

6 During the year under dispute, stakes were held in Y-KG by Q Verwaltungs-GmbH, as the general partner, and the applicant (with 89.64% of the shares) and P I, the limited liability company under German law (P I GmbH) (with 10.36% of the shares) as limited partners. Q Verwaltungs-GmbH was not required to make any investment and does not have any capital share; it does not share in any profit or loss and does not possess any voting rights. Neither A nor B nor closely associated persons hold a stake in P I GmbH.

7 On 10 April 2013, it was agreed that P I GmbH would pay a premium of EUR 3.5 million and that the applicant would provide services free of charge worth at least EUR 30.29 million for a building project of Y-KG. The applicant provided these services partly with its own personnel and its own machinery, and partly with assistance from other companies.

8 Furthermore, the applicant and Y-KG agreed on 10 April 2013 that the applicant would provide accounting and management services for Y-KG in connection with the construction project in the future in return for payment.

9 The applicant made a deduction in full on the basis of its input services for 2013. However, the Finanzamt (Tax Office), the defendant, assessed the applicant's shareholder contributions for X-KG and Y-KG without consideration as activities that did not serve to earn income in the sense of value added tax law and therefore were not classifiable as a business activity of the applicant. It held the view that tax amounts that were directly and immediately linked to these activities are not deductible.

10 The Finanzgericht (Finance Court) upheld the action brought against the tax office. It stated that the supply of benefits in kind as a shareholder contribution

forms part of the business activity. This is apparent from the case-law of the Court of Justice of the European Union It deemed that no abuse of legal tax arrangements has taken place, and that there are grounds outside of the scope of tax law that justify the chosen arrangement.

11 The Tax Office lodged an appeal on a point of law against the decision of the Finance Court before the referring court.

Summary of the grounds for the request for a preliminary ruling

Appraisal of preliminary issues

12 According to the consistent case-law of the Court of Justice and of the referring court, a holding company is entitled to deduction where its financial holding in another company is accompanied by direct or indirect involvement in the management of the company in which the holding has been acquired, in so far as involvement of that kind entails carrying out transactions which are subject to VAT by virtue of Article 2 of Directive 2006/112, such as the supply of administrative and accounting services (see judgments in *Larentia + Minerva*, C-108/14, EU:C:2015:496, paragraph 20 and 21; Order in *MVM*, C-28/16, EU:C:2017:7, paragraph 32 and 33; *Marle Participations*, C-320/17, EU:C:2018:537, paragraph 29 and 30; *C&D Foods Acquisition*, C-502/17, EU:C:2018:888, paragraph 32 et seq.).

13 The applicant supplied services in the form of accounting and management services free of charge to its subsidiary companies X-KG and Y-KG as output transactions. The parties concerned do not dispute this.

14 The applicant is therefore entitled to full deduction on the basis of the input services obtained by it. However, a right to deduction is assumed, even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduction, where the costs of the services in question are part of the taxable person's general costs and are, as such, components of the price of the goods or services that he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (see judgments in *Cibo Participations*, C-16/00, EU:C:2001:495, paragraph 31; *Portugal Telecom*, C-496/11, EU:C:2012:557, paragraph 36; *Larentia + Minerva*, C-108/14, EU:C:2015:496, paragraph 23; Order in *MVM*, C-28/16, EU:C:2017:7, paragraph 39; *Iberdrola Inmobiliaria Real Estate Investments*, C-132/16, EU:C:2017:683, paragraph 29; *Ryanair*, C-249/17, EU:C:2018:834, paragraph 31; *Vos Aannemingen*, C-405/19, EU:C:2020:785, paragraph 26; *MVM*, C-28/16, EU:C:2017:7, paragraph 39).

15 First, it is settled case-law that expenditure incurred by a holding company involved in the management of a subsidiary in respect of the various services it has purchased in connection with the acquisition of a shareholding in that

subsidiary forms part of the taxable person's general costs and is, as such, a cost component of its products, and therefore has, in principle, a direct and immediate link with the holding company's economic activity as a whole. The right to deduction must be guaranteed, without it being subjected to a criterion such as place, purpose or result of the taxable person's economic activity (judgment in *Marle Participations*, C-320/17, EU:C:2018:537, paragraph 43 and 44). To this extent, the scope of the economic activity or its result is, in principle, irrelevant.

The reference to the Court

16 It is doubtful, however, whether the applicant therefore has no entitlement to deduction, because it has obtained input services in order to contribute them to the subsidiaries and they are directly and immediately linked to exempt output transactions of the subsidiaries.

The first question referred

17 It is questionable whether the applicant obtained the input services that it passed on to X-KG and Y-KG as a shareholder contribution for its company, and whether the expenses for this form part of its 'general costs' (the cost elements of its taxed output transactions 'accounting and management for the subsidiaries').

18 This question is also raised by the judgment in *C&D Foods Acquisition*, C-502/17 (EU:C:2018:888, paragraph 37 et seq.), in which deduction was refused. In this judgment, the Court of Justice came to the conclusion that there was no transaction consisting of obtaining income on a continuing basis from activities beyond the mere sale of shares. It inferred from this that the VAT apportionable to the input services in dispute in this case was not deductible. The Court of Justice thereby also implicitly negated the notion that (in the absence of a direct and immediate link) the costs for the input services in question formed part of the general costs of the applicant in that particular case and were, as such, components of the price of the goods or services supplied.

19 Furthermore, the Court of Justice also refused deduction under certain circumstances in its judgments *The Chancellor, Masters and Scholars of the University of Cambridge*, C-316/18 (EU:C:2019:559, paragraphs 26, 27, 29, 31 et seq.); *Vos Aannemingen*, C-405/19 (EU:C:2020:785, paragraph 39); and *Iberdrola Inmobiliaria Real Estate Investments*, C-132/16 (EU:C:2017:683, paragraph 39).

20 The case in dispute therefore does not rule out that deduction is to be refused according to the case-law of the Court of Justice. The services could not have been obtained for the applicant's company and its taxed transactions, since they are directly and immediately linked to the (largely) VAT-exempt activities of the subsidiaries. The applicant ultimately could not have obtained the services for its own company but for the companies of its subsidiaries. They would then be linked to the tax-exempt transactions of the subsidiaries. The applicant's expenses for the services obtained are also not cost elements of the services it supplied (accounting

and management), nor are they part of its general costs, but instead are to be assigned to certain output transactions of the subsidiaries. The shareholder contributions paid and their amounts are of no relevance to the basis for assessing the transactions to the subsidiaries . These 'only' affect the amount of the profit to which the applicant is entitled.

The second question referred

21 Should the Court of Justice nevertheless take the view that the disputed input services give entitlement to deduction, the referring court is in doubt as to whether the intermediary actions of a parent company in obtaining services for the subsidiary in order to achieve deduction to which it is not entitled, constitutes an abuse of rights.

22 An abusive practice can be found to exist in the sphere of VAT, on the one hand, only if the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Directive and of the national legislation transposing it, result in the accrual of a tax advantage, the grant of which would be contrary to the purpose of those provisions; on the other hand, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage (see judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 74 et seq.; *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 53 and 70; see also judgment in *T Danmark*, C-116/16 and *Y Denmark*, C-117/16, EU:C:2019:135, paragraph 97).

23 The assessment of whether an abuse of rights in this sense exists requires a factual appraisal of the circumstances of the individual case. In the present dispute, the Finance Court has assumed that grounds existing outside of the scope of tax law exist. The referring court is bound by this assumption.

24 What is questionable, however, is whether the circumstances such as those in the main proceedings equate to a situation in which, for reasons of the system provided for by Directive 2006/112, and in order to avoid distortion of competition (in the form of preferring holding structures over single-tier companies) should typically be assumed to constitute abuse, even if the taxable person invokes (alleged) grounds falling outside of the scope of tax law.

25 Were the Court of Justice not to consider such an arrangement to constitute abuse, or were the grounds falling outside of the scope of tax law as found by the Finance Court to rule out abuse, there would be the risk that, in cases in which a subsidiary is not entitled to full deduction, holdings would be used as 'intermediaries' in their entire procurement of services to the effect that the holding supplies most of the services free of charge (= contributes to the subsidiary). The holding would then receive full deduction for all input services, even though most of them have nothing to do with its transactions for consideration, and deduction would be achieved that neither the parent company nor the subsidiary would have for the direct supply of services.

26 This would also not be appropriate under the system, if grounds for the ‘role of intermediary’ exist outside of the scope of tax law, and if holdings were to gain a competitive advantage over single-tier companies for which deduction is denied.