Case C-184/23

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:

22 March 2023

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

26 January 2023

Defendant and appellant on a point of law:

Finanzamt T

Applicant and respondent on a point of law:

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Subject matter of the main proceedings

Turnover tax – Second subparagraph of Article 4(4) of Directive 77/388 – Authorisation of Member States to treat as a single taxable person persons established in their territory who, while legally independent, are closely bound to one another by mutual financial, economic and organisational links – Article 6(2)(b) of Directive 77/388 – Pursuit of an activity in the exercise of powers as a public authority alongside the pursuit of an economic activity

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Does the bringing together of several persons into a single taxable person, as provided for in the second subparagraph of Article 4(4) of Directive 77/388/EEC, have the effect of removing supplies of goods or services made

for consideration between those persons from the scope of value added tax as defined in Article 2(1) of that directive?

2. Do supplies of goods or services made for consideration between those persons fall within the scope of value added tax in any event in the case where the recipient of the supply of goods or services is not (or is only partly) entitled to deduct input tax, as there is otherwise a risk of tax losses?

Provisions of European Union law relied on

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, in particular Article 2(1) and the second subparagraph of Article 4(4)

Provisions of national law relied on

Umsatzsteuergesetz (Law on Turnover Tax) (UStG), in particular Paragraph 2(2), point 2, and Paragraph 3(9a), point 2.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is a foundation governed by public law and the controlling company of a university comprising, inter alia, a school of medicine. It is a taxable person and provides services for consideration (patient care). At the same time, as a legal person governed by public law, it performs tasks in the exercise of its powers as a public authority (student teaching), in respect of which it is not considered to be a taxable person.

2 The applicant is the 'Organträger' (tax group parent), within the meaning of Paragraph 2(2), point 2, of the UStG, of U-GmbH. U- GmbH provided, inter alia, cleaning services for the applicant. It provided those services across the complex of buildings comprising the university school of medicine, that is to say on those of the school's premises which are devoted to patient care (patients' rooms, corridors and operating theatres) and are thus to be classified as falling within the applicant's economic sphere of activity, in which it operates as a taxable person, and on the premises falling within the sphere of activity in which the applicant exercises its powers as a public authority, that is to say premises used for student teaching (lecture theatres and laboratories), in respect of which it is not considered to be a taxable person.

3 Following an external audit, the Finanzamt (Tax Office) formed the view that the applicant's operations constituted a single undertaking. In that connection, the Finanzamt regarded the cleaning services which U- GmbH provides within the sphere of activity in which the applicant exercises its powers as a public authority

as supplies effected within the ‘Organschaft’ (tax group) that exists between the applicant and UmbH. In the opinion of the Finanzamt, the cleaning services form part of an activity pursued for purposes other than those of the business and generate a benefit in kind to the applicant, in accordance with Paragraph 3(9a), point 2, of the UStG (Article 6(2)(b) of Directive 77/388). On the basis of the proportion of surfaces cleaned within the sphere of activity in which the applicant exercises its powers as a public authority, the Finanzamt calculated a higher liability to turnover tax. The administrative appeal lodged against that calculation was unsuccessful.

4 The Finanzgericht upheld the action [brought against the rejection of the administrative appeal]. It held that there is in this case an ‘Organschaft’ (tax group) resulting in the consolidation of the applicant, as ‘Organträgerin’ (tax group parent) and U-GmbH, as ‘Organgesellschaft’ (subsidiary), into a single undertaking. That tax group relationship extends to the activities which the applicant carries out in the exercise of its powers as a public authority. The conditions governing the existence of a benefit in kind within the meaning of Paragraph 3(9a), point 2, of the UStG, however, are not met. It is that judgment which the defendant is challenging by its appeal on a point of law to the referring court.

Succinct presentation of the reasoning in the request for a preliminary ruling

Statutory rules of national law

5 Paragraph 2(2), point 2, of the UStG transposes the second subparagraph of Article 4(4) of Directive 77/388 into national law and provides that a legal person (an ‘Organgesellschaft’) (tax group subsidiary) which is integrated into the undertaking of another person (an ‘Organträger’) (tax group parent), on account of the financial, economic and organisational links that exist between the two, does not carry on its economic activity independently. In accordance with Paragraph 2(2), point 2, of the UStG, as based on the second subparagraph of Article 4(4) of Directive 77/388, transactions between a tax group subsidiary and a tax group parent are regarded as being performed within a single taxable person (third sentence of point 2 of Paragraph 2(2) of the UStG). These so-called internal transactions do not fall within the scope of [turnover] tax. In the case at issue, the cleaning services provided by U-GmbH to the applicant are internal transactions of this kind.

Need for a second request for a preliminary ruling

6 The first request for a preliminary ruling was intended to clarify whether the national rules on tax groups are in conformity with EU law, and whether the case at issue involves the taxation of applications for private use. Now that the Court of Justice has answered those questions, in its judgment of 1 December 2022, *Finanzamt T* (C-269/20, EU:C:2022:944), and the referring court is of the view

that the national rules on tax groups are in conformity with EU law and the case at issue does not involve the taxation of applications for private use, that judgment and the judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943), have prompted the current questions referred for a preliminary ruling, which are intended to clarify whether internal transactions within a VAT group fall within the scope of VAT and are therefore taxable.

First question referred for a preliminary ruling

7 Doubts as to whether the bringing together of several persons into a single taxable person, as provided for in the second subparagraph of Article 4(4) of Directive 77/388, has the effect of removing supplies of goods or services made for consideration between those persons from the scope of VAT (Article 2(1) of the Directive) are prompted by the judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie* (C-141/20, EU:C:2022:943).

8 On the basis of the finding that a supply is 'taxable [under Article 2(1) of Directive 77/388] only if there exists between the service supplier and the recipient a legal relationship' (judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie*, C-141/20, EU:C:2022:943, paragraph 77), 'to establish whether such a legal relationship exists between an entity forming part of a VAT group and the other members of that group, including that group's controlling company, so that the supplies made by that entity may be liable to VAT, it is necessary to determine whether that entity carries out an independent economic activity' (*loc. cit.*, paragraph 78). Consequently, if it falls to be confirmed in the particular case that the entity does carry out an independent economic activity (*loc. cit.*, paragraph 79), it does not follow from the second subparagraph of Article 4(4) of Directive 77/388 that an entity which is not the controlling company does not carry out independent economic activities simply because it belongs to the VAT group (*loc. cit.*, paragraph 80). It was on that basis that, in the present case, the Court of Justice found that U-GmbH provides services for consideration (judgment of 1 December 2022, *Finanzamt T*, C-269/20, EU:C:2022:944, paragraph 60 et seq.).

Second question referred for a preliminary ruling

9 Doubts as to whether supplies of goods or services made for consideration between persons bound to one another in the manner provided for in the second subparagraph of Article 4(4) of Directive 77/388 fall within the scope of VAT in any event in the case where the recipient of the supply of goods or services is not (or is only partly) entitled to deduct input tax, as there is otherwise a risk of tax losses, are prompted by the finding of the Court of Justice that designating as the single taxable person for a group of persons as referred to in the second subparagraph of Article 4(4) of that directive the controlling company of that group is permissible provided that that designation does not entail a risk of tax losses (judgment of 1 December 2022, *Finanzamt T*, C-269/20, EU:C:2022:944,

paragraph 1 of the operative part). In that connection, the Court of Justice points out that the controlling company's obligation to submit a tax declaration extends to the services provided and received by all of the members of that group (*loc. cit.*, paragraph 51). This may also include services which one entity provides to another within the VAT group.

10 This raises the question of whether the non-taxability of such internal transactions leads to a risk of the tax losses which the judgment of 1 December 2022, *Finanzamt T* (C-269/20, EU:C:2022:944) states must not occur. To answer that question, it may be necessary to compare the two liabilities to tax connected with the legal positions arising in the presence and in the absence of a tax group as provided for in the second subparagraph of Article 4(4) of Directive 77/388.

No answer in previous case-law

Different views of the Advocates General

11 Several Advocates General have expressed different views in their Opinions on whether internal transactions between the entities in a tax group fall within the scope of VAT.

12 According to one view, transactions for consideration carried out between the entities within a VAT group are to be regarded as intra-group transactions and, as such, non-existent for VAT purposes (Opinions of Advocate General Jääskinen of 27 November 2012 in *Commission* v *Ireland*, C-85/11, EU:C:2012:753, point 42, and of 27 November 2012 in *Commission* v *Sweden*, C-480/10, EU:C:2012:751, point 40; Opinion of Advocate General Mengozzi of 26 March 2015 in *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:212, point 49). According to the other view, internal transactions between the entities within a VAT group should fall within the scope of VAT and thus be taxable (Opinions of Advocate General Medina of 27 January 2022 in *Finanzamt T*, C-269/20, EU:C:2022:60, point 36 et seq., and of 13 January 2022 in *Norddeutsche Gesellschaft für Diakonie*, C-141/20, EU:C:2022:11, points 64 and 73.

Case-law of the Court of Justice

13 The previous case-law of the Court of Justice provides no clear answer to the question of the taxability of internal transactions. It is true that the Court of Justice has held that, by adopting the second subparagraph of Article 4(4) of Directive 77/388, the European Union legislature intended, either in the interests of simplifying administration or with a view to combating abuses, to ensure that Member States would not be obliged to treat as taxable persons those whose 'independence' is purely a legal technicality (judgments of 25 April 2013, *Commission* v *Sweden*, C-480/10, EU:C:2013:263, paragraph 37, and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14,

EU:C:2015:496, paragraph 40). However, it has not yet addressed the question of whether transactions between the entities within a VAT group fall within the scope of VAT as a question relevant to the decision to be given by the national court (see the judgments of 25 May 2008, *Ampliscientifica and Amplifin*, C-162/07, EU:C:2008:301, of 9 April 2013, *Commission* v *Ireland*, C-85/11, EU:C:2013:217, of 25 April 2013, *Commission* v *Sweden*, EU:C:2013:263, of 17 September 2014, *Skandia America [USA], Filial Sverige*, C-7/13, EU:C:2014:2225, of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, EU:C:2015:496, of 18 November 2020, *Kaplan International Colleges UK*, C-77/19, EU:C:2020:934, of 11 March 2021, *Danske Bank*, C-812/19, EU:C:2021:196, and of April 2021, *Finanzamt für Körperschaften Berlin*, C-868/19, EU:C:2021:285).

Assessment by the referring court

Wording

14 According to the wording of Article 2(1) of Directive 77/388, no distinction can be drawn, for the purposes of the taxability of a transaction, according to whether the entity within a group as provided for in the second subparagraph of Article 4(4) of Directive 77/388 makes a supply of goods or services for consideration to a third party not belonging to that group (external transaction) or to another entity within that group (internal transaction). This militates in favour of the taxability of internal transactions. The legal consequence of bringing together several persons into a single taxable person, as prescribed in the second subparagraph of Article 4(4) of that directive, permits the assumption of both taxability and non-taxability in equal measure.

Drafting history

15 The second subparagraph of Article 4(4) of Directive 77/388 allowed Member States to retain rules, such as Paragraph 2(2), point 2, of the UStG, which existed in national law prior to harmonisation. The national courts therefore maintained the view in their case-law that internal transactions are not taxable. However, the original purpose of the national rules had ceased to exist as long ago as 1968, when the new system of input tax was introduced into national law, and could therefore no longer justify the non-taxability of internal transactions.

Context

16 According to the context of Article 2(1) and Article 4(1) and (4), point 2, of Directive 77/388, entities within a tax group carry out their internal transactions in the course of an independent economic activity, with the result that such transactions are taxable. Furthermore, the second subparagraph of Article 4(4) of that directive, read in conjunction with the first subparagraph of Article 4(1), must be interpreted as precluding a Member State from classifying, by categorisation,

given entities as non-independent, where those entities are integrated, in financial, economic and organisational terms, into the controlling company of a VAT group (judgment of 1 December 2022, *Norddeutsche Gesellschaft für Diakonie*, C-141/20, EU:C:2022:943, paragraph 81).

Objectives

17 The Court of Justice regards the objectives pursued by the second subparagraph of Article 4(4) of Directive as being to ensure, 'either in the interests of simplifying administration or with a view to combating abuses such as the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, […] that Member States would not be obliged to treat as taxable persons those whose 'independence' is purely a legal technicality' (judgment of 1 December 2022, *Finanzamt T*, C-269/20, EU:C:2022:944, paragraph 43).

18 An administrative simplification in relation to procedural law has no influence on liability to tax under material law. Its effect would therefore be that internal transactions between persons bound to one another within the meaning of the second subparagraph of Article 4(4) of Directive 77/388 would continue to fall within the scope of VAT. An administrative simplification concerning material law, if it consisted in the general non-taxability of internal transactions, would lead to considerable tax losses. If, in the event of non-taxability, a distinction were drawn according to whether the recipient of the internal transaction is entitled to deduct input tax, this might run counter to the objective of administrative simplification, since it would then be necessary to decide on the diverse and often difficult-to-answer questions concerning the right to deduct provided for in Article 17 of Directive 77/388. Finally, any non-taxability of internal transactions as a result of the authorisation provided for in the second subparagraph of Article 4(4) of the Directive 77/388 may cause EU law to be applied differently in the Member States, since only some Member States have availed themselves of that authorisation. In certain sectors, this might lead to distortions of competition caused by tax law.

19 The objective of combating abuses such as splitting up one undertaking among several taxable persons in order to benefit from a special scheme does not justify the non-taxability of internal transactions. On the contrary, the general concept of abuse (see, for example, the judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 74 et seq., and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 53 and 70; see also the judgment of 26 February 2019, *T Danmark and Y Denmark*, C-116/16 and C-117/16, EU:C:2019:135, paragraph 97) might indicate that internal transactions should be taxed in any event in the case of supplies of goods or services made for consideration to entities within a tax group which are not entitled to deduct input tax, since a 'tax advantage' obtained as a result of non-taxability would otherwise run counter to Article 17(2) of Directive 77/388.