Case C-694/18

Request for a preliminary ruling

Date lodged:

7 November 2018

Referring court:

Tribunal Económico Administrativo Central de Madrid (Spain)

Date of the decision to refer:

4 October 2018

Applicant:

Ente Público Radio Televisión Madrid

Defendant:

Agencia Estatal de la Administración Tributaria (AEAT)

MINISTERIO

DE HACIENDA

(Ministry of Finance)

SECOND CHAMBER

VALUE ADDED TAX

[…][Identification of the proceedings]

FACTS

The Comunidad de Madrid (Community of Madrid) created the ENTE PÚBLICO RADIO TELEVISIÓN MADRID (Madrid Public Radio and Television Body) […]. That body is the sole shareholder of the companies which provide public radio and television services in the autonomous community, which are the entities TELEVISIÓN AUTONOMÍA MADRID, S.A. […] and RADIO AUTONOMÍA MADRID, S.A. […].

Those entities are under the control of the Autonomous Community of Madrid, are essentially public (the companies' sole shareholder **[OR. 2]** is the public body under the control of the autonomous community and they are funded primarily through that community's public budget), and are entrusted with the provision of a public service.

The operations carried out by the public companies are financed primarily from public funds and additionally from funds obtained through the marketing and sale of their products and through the provision of advertising services.

The Dependencia Regional de Inspección de la Delegación Especial de Madrid (Regional Inspectorate, Madrid Office) of the Agencia Estatal de Administración tributaria (AEAT) (State Tax Administration Agency) carried out inspection procedures in relation to the ENTE PÚBLICO RADIO TELEVISIÓN MADRID, concerning value added tax (VAT) for the 2012, 2013 and 2014 tax years.

The decisions concluding those procedures found that the object of the companies referred to is not solely the provision of public radio and television services but also other activities, since those companies are involved in the advertising market and in the marketing and sale of their own products and therefore have a dual nature.

That status as 'dual taxable persons' means that:

(a) The provision of the public radio and television service to the public body is not subject to VAT. Transfers or contributions intended for the funding of those special purpose vehicles cannot be treated as taxable consideration because they are public contributions which constitute a mere tool for the direct management of the public service.

(b) The remaining activities — involvement in the advertising market and the marketing and sale of their own products — are treated as financial activities for VAT purposes. **[OR. 3]**

In determining whether VAT was deductible, the Inspectorate concluded that:

(a) Input tax paid on purchases of goods and services which are used exclusively in the performance of operations that are part of commercial activities is deductible.

(b) Tax on goods and services used in their entirety to provide the public radio and television service are not deductible.

(c) Input tax is partially deductible where it is paid on goods and services which are used jointly or interchangeably in the performance of both categories of activity — the public broadcasting service and the commercial activities.

Dissatisfied with the above, the entity brought two complaints before the Tribunal Económico-Administrativo Central (TEAC) (Central Tax Tribunal, Spain). In those complaints, it argued that the activities as a whole carried out by the public body and the companies under its control should be classified as economic activities for VAT purposes, and therefore it should be entitled to deduct the total amount of input tax paid in respect of those activities.

In addition, on the date of this reference for a preliminary ruling, judgment is pending in a considerable number of further complaints before the Tribunal Económico-Administrativo Central (Central Tax Tribunal), which also relate to publicly owned commercial entities entrusted with the provision of public services.

As regards the complaints at issue, this tribunal has uncertainties the resolution of which requires an interpretation by the Court of Justice of the matters referred to it.

APPRAISAL OF THE ISSUES [OR. 4]

Under Article 13 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('Directive 2006/112/EC'), bodies governed by public law are not to be regarded as taxable persons provided that certain conditions are fulfilled.

According to settled case-law, without prejudice to the fulfilment of other conditions, those conditions are that the body concerned must carry out its activities directly and must do so as a public authority.

That article was transposed into Spanish law by Article 7(8) of Law 37/1992, governing VAT in Spain ('the Law on VAT').

Under that article, transactions carried out by Public Administrations are not liable to VAT if the actions of those administrations are carried out directly and constitute transactions without consideration or in return for consideration of a fiscal nature. The latter is payable in respect of the special right to use public land or in return for compulsory provision or reception services for citizens or services where there is no competition with the private sector.

The possibility that the treatment as non-taxable for VAT purposes of transactions carried out by bodies governed by public law may also be applied to public companies or companies under public control has been controversial since the introduction of the tax in Spain.

In accordance with the version of the Law on VAT in force until 31 December 2014, the treatment as non-taxable of transactions carried out directly by bodies governed by public law was prohibited where those bodies acted 'through a public, private or mixed undertaking or, in general, through commercial

undertakings'. This meant that, at least **[OR. 5]** in appearance, transactions carried out by such entities had to be treated as taxable for VAT purposes in all cases.

That liability to VAT created significant distortions, particularly where the activities of the entities concerned consisted of providing services to the bodies governed by public law which created them. The following are examples of such instances:

(a) Very labour-intensive entities (refuse collection, for example) which therefore have a low amount of input tax. Treatment of the services provided by such entities as taxable for VAT purposes led to a very considerable increase in the cost of VAT derived from the provision of their services.

(b) Public investment entities, which, because their transactions were taxable, would immediately deduct the total amount of input tax on the grounds that the subsequent sale of infrastructure constructed in this way would be subject to VAT. In this instance, the distortion was the result of the financial advantage derived from the immediate deduction of VAT in return for the payment of output tax by instalments which could be spread over very long periods.

Both situations gave rise to significant problems, particularly where the bodies which created these entities — essentially local authorities and autonomous communities — were distinct from the State itself, which mainly deals with the levying of VAT in Spain.

In the light of that situation, the Dirección General de Tributos (Directorate General of Taxes), which is the advisory body of the Ministry of Finance, decided, in binding replies to enquiries […], that the public companies in question should be treated as 'technical-legal bodies' of the public authorities which had created them. **[OR. 6]**

That treatment related to the activities of those entities in the public body's own sphere, that is exclusively by reference to internal transactions between those entities and the public administrations by which they were wholly owned. Therefore, the provision of services between those public companies and the public administrations were classified as not subject to VAT.

That position was adopted by the TEAC, which held it to be applicable in [a number of] decisions […].

In any event, transactions between the public companies in question and third parties other than the public bodies which had created them, and transactions where those public companies acted in the same way as a private operator, did not qualify as non-taxable.

In order to increase legal certainty for operators, the Law on VAT was amended and the part relating to commercial entities, referred to above, was deleted from 1 January 2015.

At the same time, two additional subparagraphs were inserted into Article 7(8) of the Law on VAT, providing expressly that the following transactions were not liable to VAT:

> (a) 'services provided, as a result of management tasks assigned to them, by public sector bodies and entities which, in accordance with Articles 4(1)(n) and 24(6) of the Texto Refundido de la Ley de Contratos del Sector Público, aprobado por el Real Decreto Legislativo 3/2011, de 14 de noviembre (Consolidated Text of the Law on Public Sector Contracts, approved by Royal Legislative Decree 3/2011 of 14 November), are classified as instruments and technical services **[OR. 7]** of the Public Administration assigning the management tasks and of the contracting authorities under its jurisdiction';
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> (b) 'services provided by any public sector bodies and entities, as referred to in Article 3(1) of the Consolidated Text of the Law on Public Sector Contracts, to the Public Administrations under whose jurisdiction they fall or to another which also comes under their jurisdiction, where those Public Administrations wholly own the bodies or entities'.

Both provisions underwent technical adjustments as a result of the entry into force of the new Law on Public Sector Contracts on 9 November 2018 but were not substantively amended.

Another provision also governs non-liability to VAT, namely Article 93(5) of the Law on VAT, pursuant to which 'no portion whatsoever of tax borne or paid on purchases or imports of goods or services intended for use exclusively in the performance of the non-taxable transactions referred to in Article 7(8) hereof shall be deductible'.

Thus, the Spanish Law on VAT provides that the transactions referred to are non-taxable. Accordingly, it also provides that it is not possible to deduct the input tax on goods and services used in the performance of those transactions.

As regards the situation described above, the TEAC is aware of the criteria laid down by the Court of Justice in its judgments of 29 October 2015, Case C-174/14, *Saudaçor*, and of 22 February 2018, Case C-182/17, *Ntp. Nagyszénás*.

In both cases, the Court of Justice classified the activities carried out by commercial entities providing services to the public bodies which had created them as economic activities for the purposes of Article 9 of Directive 2006/112/EC. **[OR. 8]**

As regards the possibility of applying Article 13 of that directive to those entities, the first judgment held that 'that company must be classified as a body governed by public law and that it carries out that activity as a public authority, in so far as the referring court finds that the exemption of that activity is not such as to lead to significant distortions of competition.'

The second judgment cited, which is more conclusive, found that 'an activity such as that at issue in the main proceedings, whereby a company performs certain public municipal tasks under a contract concluded between that company and a municipality, does not fall within the scope of the rule of treatment as a non-taxable person for value added tax purposes laid down by that provision, if that activity constitutes an economic activity within the meaning of Article 9(1) of that directive'.

In the light of the criteria set forth in those judgments, it is possible to conclude that, in situations like those referred to, the entrusting of the activities concerned to such companies entails a provision of services subject to VAT. That may be inferred from the classification of their activities as economic activities and from the non-application in that context of Article 13 of Directive 2006/112/EC.

The TEAC applied the criteria set forth in those judgments in [a number of] decisions […].

Having made that determination, this tribunal now raises an issue of a substantially different nature which is whether it is possible to apply Article 11 of Directive 2006/112/EC in such instances. **[OR. 9]**

It is well known that that article permits a Member State to 'regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links', in addition to authorising the adoption of specific measures to prevent tax evasion or avoidance resulting from the exercise of that option.

In that connection, it is assumed that entities which are not regarded as taxable persons for VAT purposes can form part of a single taxable person for VAT purposes, as the Court of Justice had occasion to state in the judgments of 9 April 2013, Case C-85/11, *Commission* v *Ireland*, and of 25 April 2013, Cases C-86/11, *Commission* v *United Kingdom*, C-95/11, *Commission* v *Denmark*, and C-109/11, *Commission* v *Czech Republic*.

Therefore, the TEAC does not consider it problematic that bodies governed by public law may be included in such units or single taxable persons, even though, as such, they may not be liable to VAT .

In the event that it is possible to regard a group of persons as a single taxable person, the main uncertainties which arise concern fulfilment of the condition

relating to the links which must exist between the entities forming the single taxable person so that the Member State concerned may treat them in that way.

In that respect, this tribunal relies on the Communication from the Commission to the Council and the European Parliament of 2 July 2009, contained in the document COM(2009) 325 final. Although that document is not binding on the Court, it is undoubtedly a highly significant background document. In it, the Commission provides the following guidance: **[OR. 10]**

> (a) The financial link is defined by reference to a percentage of participation in the capital or in the voting rights of entities. Fulfilment of this criterion requires that percentage to be over 50%, in order to guarantee that there is actual control over the formally independent entities.
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> (b) The economic link is defined by reference to the nature of the activities carried out, which must be of the same nature for all the entities in the group. Complementary or interdependent activities are also permitted, as are activities carried out to the benefit of the other entities in the group.
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> (c) The organisational link is defined by reference to the management structure of the entities, which must be at least partially shared.

The TEAC believes that those conditions should be considered to be satisfied in relation to the structures on which it is required to adjudicate, as will be established below.

The entities to which the uncertainties relate are entities in which the bodies governed by public law participate directly or indirectly as to 100%, from which it follows that the financial link referred to is fulfilled. If the participation did not guarantee the body governed by public law actual control over the entities in question, the TEAC believes that it would not be possible to apply the special arrangements in question.

The activities carried out by those entities are activities which form part of the normal provision of public [services]. For those purposes, it is possible to identify two different situations, namely:

> (a) Public services which those entities are entrusted with providing. That occurs, for example, in the case of activities such as refuse collection, which is mandatory in Spain for the majority of **[OR. 11]** local authorities, as stipulated in Article 26(1)(a) of Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local (Law 7/1985 of 2 April regulating the basis of the local government system).
>
> (b) Support or assistance services for the body governed by public law or for other entities under its control, related to its public activity.

Those activities come within the public body's sphere of action either because they remain within its remit, since they are support services, or because they are public services or predominantly public services.

The cost of those activities is borne by the body governed by public law, which holds the shares of the entities carrying out the activities, either from its own general revenue or through the imposition of a tax or levy on citizens.

This tribunal therefore believes that the condition requiring an economic link between entities is also fulfilled.

Finally, the management structures of the entities concerned have certain elements in common with the public bodies which control them.

One very important element is their financial control, as established by the application to the entities of the legislation on public procurement, which, in Spain, essentially consists of Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público (Law 9/2017 on Public Sector Contracts), together with the control instruments which that involves.

That [condition], together with the other two examined above, must also be considered to be fulfilled in relation to the business models that are being examined.

In the light of the foregoing considerations and given the existence of the financial, economic and organisational links described, the TEAC believes that it would be possible to find that the bodies governed by public law which use entities of the kind at issue to perform their public service activities could, **[OR. 12]** together with those entities, constitute taxable persons to which the special arrangements laid down in Article 11 of Directive 2006/112/EC may be applied.

That being so, the TEAC also believes that any payments or transfers made by bodies governed by public law to those entities should not be treated as consideration or, therefore, as the basis of assessment for services liable to VAT. That follows from the treatment of the entities concerned as a single taxable person and is confirmed by the judgment of the Court of Justice of 22 May 2008, Case C-162/07, *Ampliscientifica and Amplifin*, which states that, where the special arrangement referred to is applied, it is the group alone, as the taxable person, which can submit VAT declarations.

The TEAC takes the view that the issue now referred to the Court of Justice differs from those which led to the judgments in Cases C-174/14 and C-182/17. In those cases, the provisions of Directive 2006/112/EC which the Court of Justice was required to interpret were Articles 9 and 13. The present reference for a preliminary ruling concerns the interpretation of Article 11 of that directive, the subject matter of which is substantially different.

Since transactions between bodies governed by public law and the entities at issue have been classified as non-liable to VAT, this tribunal is also faced with uncertainties concerning the determination and scope of the right to deduct VAT.

As explained above, one of the reasons for the statutory formulation of the treatment for VAT purposes of those transactions in Spain was to prevent the distortions which the involvement of the entities concerned could create. Some of those distortions resulted from claims to deduct in full input VAT on the goods and services purchased by such entities. The treatment of bodies governed by public law, and the entities owned and controlled by them, as single taxable persons **[OR. 13]** must, in the opinion of this tribunal, lead to determination of the right of deduction by reference to that single taxable person. It is the latter which must apply Article 167 et seq. of Directive 2006/112/EC.

In particular, this tribunal believes that the criteria laid down in Article 168 of the directive must refer to the single taxable person.

In relation to that article, this tribunal regards as particularly significant in this context the need for the goods and services on which VAT is paid to be used to carry out activities which must be classified as economic and generate transactions on which VAT is actually levied, thereby constituting part of their cost.

Where those activities are only partially subject to VAT, the input tax must also be only partially deductible, in which case the criteria stipulated by the Court of Justice in its judgment of 13 March 2008, *Securenta*, C-437/06 will be applicable.

That means that the tax borne in respect of goods and services used only partially in the performance of taxable transactions will likewise be only partially deductible. That partial deduction must be quantified using objective methods which enable assessment of the extent to which goods and services purchased were actually used in the performance of transactions subject to VAT.

Those objective methods, and their effective application, must relate to the different entities in the group treated as a single taxable person for VAT purposes.

In that connection, in respect of any VAT payments borne by the group, it is necessary to examine the actual use to which the goods and services purchased were put. To the extent and in the proportion to which they were also used **[OR. 14]** by the group to carry out transactions subject to VAT, the tax paid will be deductible.

In that context, a particularly controversial situation has been that of public service television.

Public service television in Spain is mainly provided through commercial entities which are under direct or indirect public ownership. Those entities are financed partly by revenue generated through economic activities — essentially the

provision of advertising services — and partly by public funds. Those funds are transferred to the entities by the bodies governed by public law which control them and may exceed 90% of their total revenue.

The payment of those public funds is usually covered by programme agreements providing for the funding which entities receive and the obligations which they assume. Those obligations relate, inter alia other matters, to the entities' programming, which, therefore, is not governed exclusively by commercial considerations as might be the case of a private operator.

Public service television is included in Annex I to Directive 2006/112/EC, which lists certain activities that are to be excluded from the treatment as non-liable to VAT referred to in Article 13. For example, it classifies 'activities carried out by radio and television bodies in so far as these are not exempt pursuant to Article 132(1)(q)' as being economic in all cases. The latter article provides for the exemption of 'the activities, other than those of a commercial nature, carried out by public radio and television bodies'.

The directive appears to differentiate between two spheres of action of public radio and television bodies: **[OR. 15]**

> (a) their commercial activities, which are excluded from the exemption laid down in Article 132(1)(q) and which Annex I to the directive confirms as economic in nature, and
>
> (b) the rest of their activities, which cannot simply be said to establish the performance of an economic activity and in respect of which the exemption cannot be applied.

Accordingly, it will be necessary to establish on a case-by-case basis and by reference to their characteristics, their VAT regime.

In addition, it is necessary to take account of the criterion laid down by the Court of Justice in its judgment of 22 June 2016, *Cesky rozhlas*, C-11/15.

The Spanish legislation has for many years stated that the 'commercial activities of public radio and television entities, including those related to permission to use their facilities' are to be treated as economic activities. That was the wording of Article 7(8)(3.I) of the Law on VAT.

With effect from 1 January 2015, an additional sentence was added to that subparagraph, stating that: 'For these purposes, activities which generate or are liable to generate advertising revenue which does not come from the public sector shall be considered in all cases be regarded as commercial activities'.

That sentence was deleted from the domestic provision following the adoption and entry into force of Law 9/2017 of 8 November on Public Sector Contracts, which amended the Law on VAT.

In the context of whether it is possible to treat entities providing the public radio and television service and the public bodies which create and finance them as single taxable persons, the TEAC is uncertain about the scope of the right to deduct VAT. **[OR. 16]**

If the dual nature which Directive 2006/112/EC appears to confer on those activities is confirmed, the TEAC questions whether the criteria referred to above, laid down by the Court of Justice in Case C-437/06, should also be applied, as previously explained.

In the light of the above, this tribunal is uncertain about the scope to be attributed to Articles 11 and 168 of Directive 2006/112/EC and considers the interpretation of those provisions to be necessary in order to adjudicate on the complaints referred to in the heading.

In that connection, reference should be made to Article 267 of the Treaty on the Functioning of the European Union, which provides as follows:

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. **[OR. 17]**

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

It should be noted that, as regards a reference for a preliminary ruling made by this tribunal to the Court of Justice of the European Union under Article 267, then Article 177 of the EC Treaty, the Court, in its judgment of 21 March 2000, Joined Cases C-110/98 to C-147/98, *Gabalfrisa and Others*, held that Tribunales Económico-Administrativos (Tax Tribunals) are courts or tribunals since they satisfy the five conditions laid down for that purpose, namely: (a) statutory origin, (b) permanence, (c) compulsory jurisdiction, (d) *inter partes* procedure and (e) the application of rules of law.

In the light of the foregoing considerations and since it is considered necessary to obtain a ruling from the Court of Justice of the European Union on this matter,

The **TRIBUNAL ECONÓMICO-ADMINISTRATIVO CENTRAL** (Central Tax Tribunal) of the Kingdom of Spain, sitting as a **CHAMBER**, decides to refer the following questions to the Court of Justice of the European Union:

1. Is it possible to treat entities like those described, together with the bodies governed by public law which create them, as single taxable persons for VAT purposes, as defined by Article 11 of Directive 2006/112/EC?

2. If the answer to the previous question is affirmative, is it necessary to consider that the funding received by such entities from the bodies governed by public law which create them **[OR. 18]** cannot under any circumstances be classified as consideration for the provision of services subject to VAT?

3. As regards the deduction of input VAT payments by those entities, must it be the single taxable person which, as such, calculates the deductible amount by applying Article 168 of Directive 2006/112/EC on the basis of the activities which it carries out?

4. In particular, and as far as public service television activities are concerned, assuming that those entities are capable of having a dual nature and also assuming that, together with the bodies governed by public law which are their majority shareholders, they are treated as single taxable persons, must only the portion of input VAT which can be considered to relate to their economic activity be treated as deductible?