Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 May 2018 [1]

Case C-16/17

TGE Gas Engineering GmbH — Sucursal em Portugal
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário — Centro de Arbitragem Administrativa (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal))

(Request for a preliminary ruling — Law on value added tax — Deduction of input tax — Concept of supply of services — Apportionment of the general costs of a company's business activity among its members)

I. Introduction

1. It is a well-known phenomenon that supplies can be exchanged between a company and its members not only within the framework of the corporate relationship but also on the basis of a separate legal relationship that is independent of the corporate relationship.

2. The Court has already dealt several times with the effects of this phenomenon on the system of value added tax. [2]

3. The request for a preliminary ruling in the present case provides the Court with an opportunity to clarify the consequences for the right of deduction in the case where an economic interest group formed by undertakings apportions its general costs among its members.

II. Legal framework

A. EU law

4. The EU-law framework for this case is provided by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [3] ('the VAT Directive'). Article 167 of that directive provides:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

1 Original language: German.

2 Judgments of 27 January 2000, *Heerma* (C-23/98, EU:C:2000:46), and of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495).

3 OJ 2006 L 347, p. 1.

5. Article 168 of the VAT Directive provides:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…'

6. The first sentence of Article 44 of the VAT Directive, in the version applicable since 1 January 2010, stipulates that the place of supply of services to a taxable person is the place where that person has established his business. If, however, the service is provided to the fixed establishment of the taxable person, the place of supply of services under the second sentence of Article 44 of the VAT Directive is the place where that fixed establishment is located.

7. Measures for the implementation of that provision are contained in Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, which has applied since 1 July 2011.[4] More precise definitions of the concepts of the place where the business is established and of a fixed establishment are set out in Articles 10 and 11 of that regulation respectively.

B. National law

8. The Portuguese legislature has transposed the abovementioned provisions of the VAT Directive.

9. The Regime do Registo Nacional de Pessoas Coletivas (Law on the national register of legal entities; 'the RNPC Law') regulates the registration of legal entities in the Registo Nacional de Pessoas Coletivas (national register of legal entities; 'the RNPC').

10. Under Article 4(1)(a) and (b) of the RNPC Law, that register contains registrations both of legal entities governed by Portuguese or foreign law and of representations of legal entities governed by international law or foreign law which habitually operate in Portugal.

11. Article 13 of the RNPC Law provides that each legal entity registered in the RNPC is to receive a Número de Identificação de Pessoa Coletiva (legal entity identification number; 'NIPC') and regulates the detailed arrangements for its allocation.

III. Facts and main proceedings

12. TGE Gas Engineering GmbH ('TGE Bonn') is a German company established in Bonn. On 3 March 2009, it was allocated NIPC 980 410 878 in Portugal for the purpose of carrying out an isolated act (acquisition of shares) as a non-resident entity without a fixed establishment.

13. The applicant in the main proceedings is the Portuguese branch of TGE Bonn, which is called 'TGE Gas Engineering GmbH — Sucursal em Portugal' ('TGE Portugal'). On 7 April 2009, it was allocated NIPC 980 412 463 as a non-resident entity with a fixed establishment in Portugal.

4 OJ 2011 L 77, p. 1.

14. On 17 April 2009, TGE Bonn, together with Somague Engenharia SA ('Somague'), formed an economic interest group of undertakings (Agrupamento Complementar de Empresas) known as 'Projesines Expansão do Terminal de GNL de Sines, ACE' ('the EIG').

15. The articles of association define the members' contributions to the EIG at 85% for Somague and at 15% for TGE Bonn. By way of derogation, under an internal agreement of the economic interest group, TGE Bonn assumes 64.29% of the economic interest group's operating result and expenditure and Somague 35.71%.

16. When the EIG was formed, TGE Bonn used NIPC 980 410 878, which had been allocated to it as a non-resident entity without a fixed establishment, and not the NIPC allocated to TGE Portugal.

17. The EIG itself is a contractor for Redes Energéticas Nacionais (REN), a Portuguese electricity company, and carries out for that company the Sines Terminal Expansion Project, which concerns a liquefied natural gas terminal.

18. On 4 May 2009, the EIG entered into a subcontracting agreement with TGE Portugal. A similar agreement was also entered into with Somague.

19. Under those agreements TGE Portugal and Somague made supplies of goods and services as subcontractors to the EIG. Pursuant to the provisions of the subcontracting agreement between the EIG and TGE Portugal ('full back-to-back general principle'), the EIG invoiced all of those supplies of goods and services made to it by TGE Portugal to REN as the client.

20. The EIG invoiced the costs incurred for its own business activity to TGE Portugal in the order of 64.29% using the NIPC which had been allocated to TGE Portugal. Somague was invoiced for 35.71% of the costs by the EIG. The sole purpose of invoicing was to apportion the EIG's costs among its members. Thus, the costs were shared in accordance with the internal members' agreement on meeting the EIG's liabilities. Nevertheless, the EIG showed the VAT on invoices and paid it to the Portuguese tax authority, which at no point raised any objection.

21. TGE Portugal subsequently claimed deduction of the VAT shown on those invoices.

22. In the context of a tax audit of TGE Portugal by the Autoridade Tributária e Aduaneira (tax and customs authority; 'the ATA') for the assessment periods 2009, 2010 and 2011, a tax inspection report was drawn up. In that report, the ATA found that, because of the different NIPCs, TGE Portugal and TGE Bonn would have to be treated as separate legal entities. As TGE Bonn was a member of the EIG, but TGE Portugal was not, the EIG had acted unlawfully in invoicing its costs to TGE Portugal. The deduction of input tax by TGE Portugal for those costs had, it found, been unlawful.

23. On the basis of those findings, the ATA issued assessments of VAT and compensatory interest to TGE Portugal. On 28 March 2014, TGE Portugal lodged an internal administrative objection to those assessments for the assessment periods 2010 and 2011, which was rejected by the ATA.

24. On 19 September 2014, TGE Portugal brought an administrative appeal against the decision rejecting the internal administrative objection, which was dismissed by a decision notified to it on 25 September 2015.

25. On 22 December 2015, TGE Portugal submitted the application for arbitration in respect of that appeal to the referring court.

IV. Request for a preliminary ruling and procedure before the Court of Justice

26. By arbitral decision of 29 June 2016, received on 16 January 2017, the Tribunal Arbitral Tributário (Tax Arbitration Tribunal, Portugal) referred the following question to the Court for a preliminary ruling pursuant to Article 267 TFEU:

Must Articles 44, 45, 132(1)(f), 167, 168, 169, 178, 179 and 192a, 193, 194 and 196 of the VAT Directive (Directive 2006/112), Articles 10 and 11 of Implementing Regulation (EU) No 282/2011 and the principle of neutrality be interpreted as precluding the Portuguese tax authorities from refusing the right to deduction of VAT by a branch of a German company, in circumstances where:

– the German company obtained a tax identification number in Portugal to carry out an isolated act, namely 'acquisition of shares', corresponding to a non-resident entity without a permanent establishment;

– subsequently, the branch of that German company was registered in Portugal and was assigned its own tax number, as a permanent establishment of that company;

– later, the German company, using the first identification number, entered into a contract with another company to establish an economic interest group (Agrupamento Complementar de Empresas) (EIG) to carry out a works contract in Portugal;

– subsequently, the branch, using its own tax number, entered into a subcontract with the EIG, setting out the reciprocal services between the branch and the EIG and agreeing that the latter would invoice the subcontractors, in the agreed proportions, for the costs which it incurred;

– the EIG indicated the branch's tax identification number in the debit notes which it issued to invoice costs to that branch, and charged VAT;

– the branch deducted the VAT charged in the debit notes;

– the transactions of the EIG (by way of subcontracting) consist of the transactions of the branch and of the other company forming part of the EIG, these latter having invoiced to the EIG the entire revenue that the EIG invoiced to the developer?

27. In response to a request for information from the Court, the referring court — and the applicant in the main proceedings — made it clear that the sole purpose of the EIG's debit notes had been to apportion the general costs of its business among the members.

28. In the proceedings before the Court, TGE Portugal, the Portuguese Republic and the European Commission submitted written observations and also took part in the hearing held on 19 March 2018.

V. Assessment

A. Capacity of the referring court to submit a request for a preliminary ruling

29. As the Court has already ruled, the Tribunal Arbitral Tributário (Tax Arbitration Tribunal) is to be considered a court or tribunal of a Member State for the purposes of Article 267 TFEU and thus has the capacity to make a reference to the Court.[5]

5 Judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraphs 23 to 34).

B. Interpretation of the question referred

30. In its question, the referring court mentions the different NIPCs which were allocated to TGE Bonn and TGE Portugal and used in connection with the EIG, namely the NIPC for TGE Bonn when the agreement forming the EIG was concluded and the NIPC for TGE Portugal when the subcontracting agreement with the EIG was concluded.

31. In essence, however, the referring court's question seeks clarification as to whether TGE Bonn or TGE Portugal has a right of deduction if the EIG invoices its general costs, showing VAT, to TGE Portugal. The referring court thus wishes to know, in essence, whether the conditions for deduction of input tax are satisfied in a case such as the present.

C. Right to deduct input tax

32. The conditions for the right to deduct input tax are set out in Article 168(a) of the VAT Directive: a person is entitled to deduct the VAT due or paid at the preceding stage if he is himself a taxable person and has received a supply of goods or services from another taxable person, which he uses for the purposes of his own business.

33. It is not disputed that in the present case the EIG paid the VAT which it had invoiced to TGE Portugal. It is also not disputed that the EIG is in principle a taxable person within the meaning of the VAT Directive.

34. However, it is necessary to clarify whether TGE Portugal is the recipient of a supply of services in respect of payment of the costs.

1. Taxable person as recipient of the supply of services

35. Under Article 168 of the VAT Directive, only a taxable person is entitled to deduct input tax. The recipient of the supply of services must therefore be a taxable person within the meaning of the directive.

36. The first subparagraph of Article 9(1) of the VAT Directive provides that a taxable person is any person who, independently, carries out any economic activity.

37. With regard to a company's relationship with its branch in another Member State, the Court has already ruled that the branch does not carry out an independent economic activity because it does not itself bear the economic risk of its economic activity, in particular because it has no endowment capital.[6] Instead, the economic risk is borne solely by the company to which the branch belongs.

38. Even though the concept of a taxable person in EU law must be given an autonomous and uniform interpretation[7] and thus covers not only natural and legal persons but also entities which are not legal persons,[8] a company and its branch in another Member State form a single legal entity within which there are not two separate taxable persons.[9]

39. By this standard, TGE Bonn and TGE Portugal form *one* taxable person (TGE) for the purposes of the VAT Directive.

6 Judgments of 23 March 2006, *FCE Bank* (C-210/04, EU:C:2006:196, paragraphs 33 to 37), and of 17 September 2014, *Skandia America Corp. (USA), filial Sverige* (C-7/13, EU:C:2014:2225, paragraphs 25 and 26).

7 Judgment of 17 September 2014, *Skandia America Corp. (USA), filial Sverige* (C-7/13, EU:C:2014:2225, paragraph 23).

8 Judgment of 27 January 2000, *Heerma* (C-23/98, EU:C:2000:46, paragraph 8).

9 Opinion of Advocate General Léger in *FCE Bank* (C-210/04, EU:C:2005:582, point 38).

40. This conclusion is not affected by the fact that TGE Bonn and TGE Portugal have different NIPCs and that the NIPC for TGE Bonn was used when the EIG was formed, whereas the NIPC for TGE Portugal was used for invoicing with a view to apportioning costs.

2. Existence of a supply of services

41. Article 168(a) of the VAT Directive requires that a supply (supply of goods within the meaning of Article 14 or supply of services within the meaning of Article 24(1) of the VAT Directive) be made to the taxable person entitled to deduct input tax.

42. According to the Court's settled case-law, a supply is taxable only if there exists between the supplier and the recipient a legal relationship in which there is a reciprocal performance, the remuneration received by the supplier constituting the value actually given in return for the goods or service supplied to the recipient. [10]

43. Accordingly, the basis of assessment for a supply of services is everything which makes up the consideration for the service and a supply of services is therefore taxable only if there is a direct link between the service provided and the consideration received. [11]

44. In the present case, the EIG would therefore have had to have provided a specific service of which TGE is the recipient. Only then would the sums invoiced by the EIG to TGE and paid by TGE constitute consideration for a supply of services for which VAT is actually due.

45. However, as the referring court and the applicant in the main proceedings state in their replies to the request for information from the Court, the sums in question relate to the general costs of the EIG's business activity. The sole purpose of the invoices was to apportion those costs to TGE as a member. The sums were not paid in return for any supply by the EIG to TGE and did not therefore constitute consideration.

46. Accordingly, no specific supply of services was made to the taxable person in this case. Instead, the sums invoiced to and paid by TGE represent an apportionment of the general costs of the EIG among its members stemming from their duty to share in profits and to bear losses, but do not represent consideration for a specific activity.

47. This conclusion is confirmed by the Court's decision in *Cibo Participations*. In that case, the Court ruled that the payment of a dividend does not constitute consideration for a service, but is merely the result of ownership of the share and thus of status as a shareholder. In particular, the existence of distributable profits is generally a prerequisite of paying a dividend and that payment is thus dependent on the company's year-end results. [12] In the present case, the EIG does not, it is true, distribute dividends, that is to say, shares in profits, to members. Instead, the members pay a sum to the EIG. However, as the tax authority asserted in the main proceedings, at issue here are the general costs of the EIG's business activity. The way in which these costs are borne is ultimately like a mirror image of the distribution of dividends in *Cibo Participations*. The amount of the sum invoiced by the EIG depends on its profit situation, just as the amount of dividends distributed depended on the profit situation of the companies in which Cibo Participations had a shareholding. By virtue of its status as a member, a member is not only entitled to share in profits, but is also required in the

10 Judgments of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 14); of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 39); of 23 March 2006, *FCE Bank* (C-210/04, EU:C:2006:196, paragraph 34); and of 17 September 2014, *Skandia America Corp. (USA), filial Sverige* (C-7/13, EU:C:2014:2225, paragraph 24).

11 Judgments of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 13), and of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 39).

12 Judgment of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraphs 42 and 43); this means that the distribution of dividends is dependent on the company's economic result.

present case to cover expenditure incurred. While the *Cibo Participations* case concerned participation in profits, the present case relates to coverage of expenditure incurred. In both cases the payments made are the result of status as a member and do not therefore constitute consideration for a supply of services.

48. The absence of consideration distinguishes the present case from the situation in *Heerma*. In that case, the partner in a partnership had let a property to the partnership, in respect of which the partnership paid him a rent that was independent of his share in its profits and losses. The Court ruled in that case that the letting of the property constituted a VAT-taxable supply because it was effected for a specific consideration. [13]

49. Lastly, the situation at issue in the present case also cannot be compared to the membership fee paid by a member of an association. The Court did, it is true, rule in *Kennemer Golf* that the membership fee forms the basis of assessment for VAT if it is the consideration for the possibility of using items of the association's property. [14] First, the duty to pay membership fees does not stem directly from the fact that the association makes a profit or loss, but is based on the association's freedom to establish its own articles of association. Furthermore, in that case the fee related to a *specific* right of members to use the association's sports facilities. In the present case, by contrast, the amount of the sums invoiced to and paid by TGE depends *solely* on the economic result of the EIG. Second, the EIG does not give TGE the opportunity to use items of its property and charge a consideration in return. Instead, the invoiced sum is the result of TGE's status as a member and the ensuing duty to share in profits and to bear losses.

50. Contrary to the submission made by the Commission at the hearing, this is not a case in which services are commissioned for the purposes of Article 28 of the VAT Directive. The subject matter of the main proceedings is solely the invoicing of expenditure incurred by the EIG in purchasing supplies of goods and services from third parties. Those third-party supplies were made *to the EIG itself*, however. They were used for its business and were not passed on to its members, since, as the referring court has expressly stated, there is no supply made by the EIG to its members in this regard. The conditions laid down in Article 28 of the VAT Directive ('takes part in a supply of services') are therefore not satisfied.

51. The same conclusion follows from the principle of neutrality.

52. According to the Court's settled case-law, the right to deduct is a fundamental principle which underlies the common system of VAT and serves to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. [15]

53. The common system of VAT consequently ensures neutrality in regard to taxation of all economic activities. This is, however, subject to the condition that those activities are themselves in principle subject to VAT. [16]

13 Judgment of 27 January 2000, *Heerma* (C-23/98, EU:C:2000:46, paragraphs 13 and 19).

14 Judgment of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 40).

15 Judgments of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 27); of 12 September 2013, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraphs 26 and 27); and of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraphs 37 to 39).

16 Judgment of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 27); of 12 September 2013, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 27); and of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 39).

54. As, in the light of the foregoing, there is no supply of services within the meaning of Article 24(1) of the VAT Directive, the EIG did not owe any VAT for 'charging on' the general costs of its business activity which it apportioned among its members. The VAT was therefore wrongly paid. Because the tax was not payable, from the point of view of EU law, there is no scope for applying the principle of neutrality. In the present case, that principle does not require TGE to be relieved of the burden of the VAT on the sums paid to the EIG if the tax is not even payable under EU law.

55. It must therefore be stated that the EIG does not make a supply of services to TGE which would give the latter a right to deduct.

3. Place of supply

56. The referring court also requests the Court to interpret Articles 44 and 45 of the VAT Directive, which define the place of supply of services.

57. Under the first sentence of Article 44 of the VAT Directive, the place of supply of services is the place where the *recipient of the supply of services* has established his business. The EU legislature opted for this as the primary point of reference because, as a criterion that is objective, simple and practical, it offers great legal certainty. [17]

58. On the other hand, the point of reference of the fixed establishment of the recipient of the supply of services in the second sentence of Article 44 of the VAT Directive is subordinate and an exception to the general rule. [18]

59. Even though the Court clarified the relationship between these two points of reference in *Welmory*, the relevant factor under both the first sentence of Article 44 and the second sentence of Article 44 of the VAT Directive is, of course, receipt of a supply of services by the taxable person.

60. As was stated above, however, there is no supply of services in the present case. In the absence of a supply of services, it is not therefore possible to determine the place of supply of services.

61. Consequently, the referring court's question in this regard cannot be answered.

VI. Conclusion

62. In the light of the foregoing considerations, I propose that the Court answer the request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration)) as follows:

Article 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in the absence of a taxable supply of goods or services, there is no right of deduction in the case where an Agrupamento Complementar de Empresas (Economic Interest Group) apportions the general costs of its business activity to a foreign company, which is a member, even though value added tax was wrongly paid on that sum and that sum was invoiced to the domestic branch of the member.

17 Judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraphs 53 to 55).

18 Judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 56).