Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 September 2017 *

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 132(1)(f) — Exemptions for certain activities in the public interest — Exemption for the supply of services by independent groups of persons for their members — Applicability to financial services)

In Case C-326/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), made by decision of 9 June 2015, received at the Court on 1 July 2015, in the proceedings

'DNB BANKA' AS

v

Valsts ienemumu dienests,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, C. Vajda (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 30 June 2016,

after considering the observations submitted on behalf of:

– 'DNB Banka' AS, by M. Kairovs, J. Teteris and I. Sloka,

– the Latvian Government, by A. Bogdanova, I. Kucina, D. Pelše and I. Kalniņš, acting as Agents,

– the German Government, by T. Henze, acting as Agent,

– the Greek Government, by K. Nasopoulou and A. Dimitrakopoulou, acting as Agents,

– the Luxembourg Government, by D. Holderer, acting as Agent, assisted by F. Kremer and P.-E. Partsch, avocats,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

* Language of the case: Latvian.

– the Polish Government, by B. Majczyna, B. Majerczyk-Graczykowska and K. Maćkowska, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes and R. Campos Laires, acting as Agents,

– the United Kingdom Government, initially by S. Simmons, and subsequently by C. R. Brodie and D. Robertson, acting as Agents, assisted by O. Thomas, QC,

– the European Commission, by M. Owsiany-Hornung and A. Sauka, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 132(l)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between 'DNB Banka' AS and the Valsts ieņēmumu dienests (National Tax Authority, Latvia) ('the VID') concerning the latter's refusal of the request submitted by DNB Banka to have its value added tax (VAT) declarations corrected.

Legal context

EU law

The Sixth Directive

3 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 (OJ 1977 L 145, p. 1, 'the Sixth Directive') was repealed and replaced, as from 1 January 2007, by Directive 2006/112. Article 13 of the Sixth Directive provided:

'A. Exemptions for certain activities in the public interest

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;

…'

Directive 2006/112

4 Directive 2006/112 contains a Title IX, entitled 'Exemptions', of which Chapter 1 is entitled 'General Provisions'.

5 Article 132(1) of Directive 2006/112, which appears in Chapter 2, entitled 'Exemptions for certain activities in the public interest', of Title IX of that directive, provides:

'Member States shall exempt the following transactions:

…

(f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;

…'

6 Article 135(1) of Directive 2006/112, which appears in Chapter 3, entitled 'Exemptions for other activities', of Title IX of that directive, provides:

'Member States shall exempt the following transactions:

…

(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

…'

Latvian law

7 Article 6(1)(17) of the likums par pievienotās vērtības nodokli (Law on value added tax) of 9 March 1995 (Latvijas Vēstnesis, 1995, No 49), in the version applicable to the main proceedings, provides for the exemption of the financial transactions listed in that provision.

8 During the period at issue in the main proceedings, Article 132(1)(f) of Directive 2006/112 had not yet been transposed into national law. On 1 January 2013, a new Law on value added tax entered into force, the Pievienotās vērtības nodokļa likums ('Law on value added tax') of 29 November 2012. Article 52 of that law, in the version which entered into force on 1 January 2014, provides, in paragraph 3.[2], that services supplied by a member of an independent group of persons ('IGP') to other persons in that group are exempt under certain circumstances.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 DNB Banka is a credit institution, established in Latvia, which provides financial services.

10 DNB Banka is a subsidiary of DNB NORD A/S (now DNB INVEST DENMARK A/S), a company established in Denmark, which also owns two other subsidiaries, AB DNB NORD Bankas, a Lithuanian company, and Bank DNB Polska SA, a Polish company, as well as an Estonian branch, DNB NORD Pank. All those entities, which are active in the area of financial services, make up the DNB Group.

11 DNB NORD is also the sole owner of DNB NORD IT A/S (now, after restructuring, DNB INVEST DENMARK) ('DNB IT'), a company established in Denmark tasked with providing support in the area of information technology.

12 DNB NORD is a subsidiary of DNB Bank ASA, established in Norway, and of NORD/LB Norddeutsche Landesbank, established in Germany. Both those companies form a joint undertaking through which DNB Bank holds 51% of the shares in the DNB Group.

13 On 31 August 2006, DNB Banka concluded a contract with DNB NORD for the provision of financial services. Under that contract, DNB NORD provides services to DNB Banka on a continuous basis and to the extent necessary, ensuring the group's joint functions and responding to specific requests from DNB Banka as its subsidiary. On the basis of that contract, DNB Banka received, in 2009 and 2010, a number of invoices pertaining to the management services provided by DNB NORD. According to the documentation relating to the transfer pricing, drawn up in 2011, DNB NORD applied a 5% uplift, in 2009 and 2010, to the pricing for the provision of management services.

14 On 30 April 2009, DNB Bank, in agreement with DNB Banka, concluded a contract with Microsoft Ireland Operations Ltd relating to the purchase of products and licences marketed by Microsoft for the needs of DNB Bank and its connected undertakings. Under that contract, DNB Bank receives an invoice from Microsoft Ireland Operations for software purchased which all of the undertakings in the DNB Group use. Subsequently, DNB Bank allocates the relevant costs to the other undertakings in the DNB Group on the basis of the specific programs which each undertaking has received. In 2009 and 2010, DNB Banka thus received invoices pertaining to the licences marketed by Microsoft.

15 On 20 December 2010, DNB IT concluded a contract relating to information technology management with DNB NORD and with its subsidiaries, according to which DNB IT is the only entity in the DNB Group to provide services connected with information technology projects. In 2010 and 2011, DNB IT, on the basis of that contract, sent a number of invoices to DNB Banka for the information technology services thus provided. According to the items relating to costs referred to in those invoices, an uplift of 5% was applied to the pricing of those services.

16 DNB Banka was the subject of a tax inspection in which it maintained that the transactions concerned were exempt from VAT. The administrative procedure was concluded with a decision of the Director General of the VID of 9 July 2012, in which she rejected DNB Banka's request that its VAT declarations relating to the transactions concluded with DNB NORD, DNB IT and DNB Bank be corrected.

17 That decision is based on the following considerations. In the first place, as regards the transactions carried out between DNB Banka and DNB NORD, the VID found that there were no documents which made it possible to identify clearly the persons which formed the IGP, for the purposes of Article 132(1)(f) of Directive 2006/112. The VID considered that the fact that there was a group of connected undertakings whose members provided each other with services did not demonstrate the existence of an IGP, for the purposes of that provision.

18 In the second place, the VID, referring to recital 7 of Directive 2006/112, took the view that the transactions carried out between DNB Banka and DNB IT amounted to unfair competition. That assessment is based on the fact that the service provider, DNB IT, is liable to pay tax for the information technology services in question in its Member State of establishment, in accordance with

general arrangements, and that the input tax on those services has been deducted, while DNB Banka, as recipient of those services, is not liable to pay tax for those same services, as they are considered to be exempt from VAT.

19 In the third place, as regards the transactions carried out between DNB Banka and DNB Bank, the VID was unable to identify specifically the persons which, according to DNB Banka, had to be classified as members of the IGP for whose services exemption was invoked. In addition, according to the VID, there is no justification for considering that DNB Bank had to be classified as a member of that IGP carrying on an activity exempt from VAT.

20 DNB Banka submitted an application to the administratīvā rajona tiesa (District Administrative Court, Latvia) for an order requiring the VID to correct its VAT declarations relating to the transactions conducted with DNB NORD, DNB IT and DNB Bank. That court dismissed that application by decision of 1 November 2013.

21 DNB Banka lodged an appeal against that decision before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), claiming that all the criteria referred to in Article 132(1)(f) of Directive 2006/112 had been fulfilled. According to DNB Banka, the administratīvā rajona tiesa (District Administrative Court) did not interpret Article 132(1)(f) of Directive 2006/112 correctly when it dismissed its application on the ground that the total amount of the invoice also included an uplift, without examining the reasons justifying the existence of that uplift. DNB Banka maintains that that uplift was included in compliance with the guidelines of the Organisation for Economic Co-operation and Development (OECD) and with the requirements of corporation tax legislation, and consequently the application of such an uplift cannot be used as a ground for refusing an exemption from VAT.

22 In those circumstances, the Administratīvā apgabaltiesa (Regional Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is it possible for there to be an [IGP], for the purposes of Article 132(1)(f) of Directive [2006/112], when the members of the [IGP] are established in separate Member States of the European Union in which that provision of the directive has been transposed with different requirements which are not compatible?

(2) Can a Member State restrict the right of a taxable person to apply the exemption provided for in Article 132(1)(f) of Directive [2006/112], when that taxable person has satisfied all the requirements for the application of the exemption in its Member State, but that provision of the directive has been transposed into the national law of the Member States of other members of the [IGP] with restrictions which limit the possibility for taxable persons of other Member States of applying in their own Member State the corresponding exemption from VAT?

(3) Is it permissible to apply the exemption in Article 132(1)(f) of Directive [2006/112] to services in the Member State of the recipient of those services, which is a taxable person for [VAT], when the provider of the services, also a taxable person for [VAT], has applied in another Member State [VAT] to those services in accordance with general arrangements, that is, considering that [VAT] on those services was payable in the Member State of the recipient of those services, in accordance with Article 196 of Directive [2006/112]?

(4) Must the term ‘[IGP]’, for the purposes of Article 132(1)(f) of Directive [2006/112], be taken to mean a separate legal person whose existence has to be proved through a specific agreement creating that [IGP]?

If the reply to that question is that an [IGP] need not necessarily be taken to mean a separate entity, is an [IGP] to be regarded as a group of related undertakings in which, in the course of their usual economic activities, those undertakings provide each other with support services for carrying out their commercial activities, and may the existence of that [IGP] be proved through the contracts for services concluded or through documentation on transfer prices?

(5) Can a Member State restrict the right of a taxable person to apply the [VAT] exemption in Article 132(1)(f) of Directive [2006/112], when that taxable person has applied an uplift to the transactions, as required under the legislation on direct taxation of the Member State where the taxable person is established?

(6) Does the exemption in Article 132(1)(f) of Directive [2006/112] apply to services received from third countries? In other words, where a member of an [IGP], as referred to in Article 132(1)(f) of Directive [2006/112], provides, within that [IGP], services to other members of the [IGP], can that person be a taxable person from a third country?'

Consideration of the questions referred

23 As a preliminary point, it should be observed that DNB Banka is a credit institution whose activities consist in providing financial services. According to that company, the services supplied to it by other entities belonging to the same group of companies, that is to say, DNB NORD, DNB IT and DNB Bank, come under the exemption in Article 132(1)(f) of Directive 2006/112. Since that provision was not transposed into national law during the period at issue in the main proceedings, DNB Banka requested that it be applied directly to the dispute in the main proceedings.

24 In that context, all the questions referred concern the interpretation of Article 132(1)(f) of Directive 2006/112 which provides for an exemption of the supply of services by independent groups of persons, which are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons for the purpose of rendering their members the services directly necessary for the exercise of that activity.

25 Before replying to those questions it is necessary to examine the issue whether that provision applies in circumstances such as those in the main proceedings which concern services provided by an IGP whose members carry on an economic activity in the area of financial services.

26 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with all those elements for the interpretation of EU law which may be of assistance in adjudicating on the case pending before it, whether or not the referring court has specifically referred to them in its question (judgment of 20 October 2016, *Danqua*, C-429/15, EU:C:2016:789, paragraph 37 and the case-law cited).

27 In those circumstances, it is also necessary to provide the referring court with guidance on the issue whether Article 132(1)(f) of Directive 2006/112 is intended to apply to the services provided by an IGP whose members carry on an economic activity in the area of financial services which are directly necessary for the exercise of that activity.

28 In that regard, it should be pointed out that the terms of that provision, which refer to an exempt activity of the members of an IGP, do not preclude the possibility of that exemption being applied to the services of an IGP whose members carry on an economic activity in the area of financial services, inasmuch as Article 135(1)(d) of that directive exempts financial services.

29 However, according to settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgments of 26 April 2012, *Able UK*, C-225/11, EU:C:2012:252, paragraph 22, and of 4 April 2017, *Fahimian*, C-544/15, EU:C:2017:255, paragraph 30 and the case-law cited).

30 As regards the context of Article 132(1)(f) of Directive 2006/112, it should be pointed out that that provision is included in Chapter 2, entitled 'Exemptions for certain activities in the public interest', of Title IX of that directive. That heading indicates that the exemption provided for in that provision refers only to those IGPs whose members carry on activities in the public interest.

31 That interpretation is also confirmed by the structure of Title IX of that directive relating to 'Exemptions'. Within Directive 2006/112, Article 132(1)(f) is included, not in Chapter 1, entitled 'General Provisions', of that title, but in Chapter 2. Moreover, in that title, a distinction is made between Chapter 2, entitled 'Exemptions for certain activities in the public interest', and Chapter 3, entitled 'Exemptions for other activities', a distinction which indicates that the rules laid down in Chapter 2 for certain activities in the public interest do not apply to the other activities referred to in Chapter 3.

32 Chapter 3 includes, in Article 135(1), an exemption for certain transactions in the area of financial services, such as, in particular, '(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments' and '(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender'. It is thus clear from the general scheme of Directive 2006/112 that the exemption provided for in Article 132(1)(f) of Directive 2006/112 does not apply to transactions carried out in the area of financial services and that, accordingly, the services provided by IGPs whose members are active in that area do not come within that exemption.

33 As regards the aim of Article 132(1)(f), within Directive 2006/112, it is necessary to recall the purpose of all of the provisions of Article 132 of that directive, which is to exempt from VAT certain activities in the public interest with a view to facilitating access to certain services and the supply of certain goods by avoiding the increased costs that would result if they were subject to VAT (judgment of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraph 30 and the case-law cited).

34 Thus, the services provided by an IGP come within the exemption provided for in Article 132(1)(f) of Directive 2006/112 where the provision of those services contributes directly to the exercise of activities in the public interest referred to in Article 132 of that directive (see, by analogy, judgment of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraphs 31 to 33).

35 In addition, it must be recalled that the scope of the exemptions referred to in Article 132 of Directive 2006/112 is to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, to that effect, judgment of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraph 34 and the case-law cited).

36 It follows, therefore, that the supply of services which do not contribute directly to the exercise of activities in the public interest referred to in Article 132, but to the exercise of other exempt activities, in particular those referred to in Article 135 of that directive, cannot come under the exemption provided for in Article 132(1)(f) of Directive 2006/112.

37 Accordingly, Article 132(1)(f) of Directive 2006/112 should be interpreted to the effect that the exemption provided for in that provision relates only to IGPs whose members carry on activities in the public interest referred to in that article. Therefore, services provided by IGPs, whose members carry on an economic activity in the area of financial services, which does not constitute an activity in the public interest, are not entitled to that exemption.

38 In that regard, it should be pointed out that, unlike what it is doing in the present case, the Court, in the judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621), did not resolve the question whether the exemption provided for in Article 13A(1)(f) of the Sixth Directive (corresponding to Article 132(1)(f) of Directive 2006/112) was limited to the services provided by an IGP whose members carried on activities in the public interest.

39 However, it is clear from the information in the documents before the Court that the Court's interpretation of the exemption provided for in Article 13A(1)(f) of the Sixth Directive in its judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621), led to some Member States exempting services supplied by IGPs made up of entities such as insurance companies or undertakings active in the area of financial services.

40 In that regard, it should, however, be noted that national authorities could not reopen tax periods which have been definitively closed, on the basis of Article 132(1)(f) of Directive 2006/112, as interpreted in paragraph 37 above (see, by analogy, judgments of 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 37, and of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68).

41 As regards tax periods which have not yet been definitively closed, it must be recalled that, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual (see, inter alia, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 30 and the case-law cited). Thus, national authorities cannot rely on Article 132(1)(f) of Directive 2006/112, as interpreted in paragraph 37 above, in order to withhold that exemption from IGPs made up of entities such as credit institutions and, therefore, in order to refuse to exempt the supply of services by those IGPs from VAT.

42 In addition, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 100).

43 Therefore, the interpretation which the national court must give to the relevant rules of national law implementing Article 132(1)(f) of Directive 2006/112 must abide by the general principles of EU law, in particular the principle of legal certainty.

44 In view of the foregoing, there is no need to reply to the first to sixth questions.

45 In the light of all of the foregoing, the answer to the request for a preliminary ruling is that Article 132(1)(f) of Directive 2006/112 must be interpreted to the effect that the exemption provided for in that provision relates only to IGPs whose members carry on an activity in the public interest referred to in Article 132 of that directive and that, therefore, the services supplied by a group whose members carry on an economic activity in the area of financial services, which does not constitute such an activity in the public interest, are not entitled to that exemption.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 132(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted to the effect that the exemption provided for in that provision relates only to independent groups of persons whose members carry on an activity in the public interest referred to in Article 132 of that directive and that, therefore, the services supplied by a group whose members carry on an economic activity in the area of financial services, which does not constitute such an activity, in the public interest are not entitled to that exemption.

[Signatures]