Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

11 March 2021 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 9 – Taxable person – Concept – Article 11 – VAT group Principal establishment and branch of a company situated in two different Member States – Principal establishment forming part of a VAT group to which the branch does not belong – Principal establishment providing services to the branch and imputing to it the costs of those services)

In Case C?812/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), made by decision of 24 October 2019, received at the Court on 4 November 2019, in the proceedings

Danske Bank A/S, Danmark, Sverige Filial,

v

Skatteverket,

THE COURT (Seventh Chamber),

composed of A. Kumin, President of the Chamber, T. von Danwitz (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Danske Bank A/S, Danmark, Sverige Filial, by T. Karlsson,

– Skatteverket, by K. Alvesson, acting as Agent,

– the Danish Government, by J. Nymann-Lindegren, P. Jespersen and M.S. Wolff, acting as Agents,

– the French Government, by E. Toutain and E. de Moustier, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the European Commission, by R. Lyal, K. Simonsson and G. Tolstoy, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1), Article 9(1) and Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between Danske Bank A/S, Danmark, Sverige Filial, a Swedish branch of the Danish company Danske Bank A/S, and Skatteverket (Swedish Tax Agency) concerning a tax ruling issued by the Skatterättsnämnden (Revenue Law Commission, Sweden) concerning the mervärdesskattelagen (1994:200) (Law (1994:200) on value added tax; 'the ML').

Legal context

European Union law

3 Article 2(1)(c) of the VAT Directive provides:

'The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such.'

4 Article 9(1) of that directive provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

5 Under Article 11 of that directive:

'After consulting the advisory committee on value added tax ("the VAT Committee"), each Member State may 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.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.'

Danish law

6 In Denmark, Article 11 of the VAT Directive was transposed by Article 47(4) of the lov om merværdiafgift (Law on VAT). That provision authorises, in particular, a number of taxable persons with the same owner to register a Danish VAT group. It is also clear from that paragraph that the group may involve only undertakings established in Denmark, so that a principal establishment or branch may become a member of a Danish VAT group only if it constitutes a permanent

establishment in Denmark.

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

7 Danske Bank is a company the principal place of business of which is in Denmark. It carries on its activity in Sweden through a branch, Danske Bank, Danmark, Sverige Filial, established in that Member State. Danske Bank's principal establishment is part of a Danish VAT group ('the Danish VAT group at issue'), established under the Danish legislation transposing Article 11 of the VAT Directive. Its branch in Sweden is not part of any Swedish VAT group.

8 Danske Bank uses a computer platform in its activities in the Scandinavian countries. That platform is, to a great extent, common to all the company's establishments. The costs associated with the use of that platform by the Swedish branch for the purposes of its activities in Sweden are charged to it by Danske Bank's principal establishment.

9 The purpose of the request for an advance ruling sent to the Skatterättsnämnden (Revenue Law Commission) by the Swedish branch of Danske Bank was, inter alia, to determine whether the fact that Danske Bank's principal establishment belongs to a Danish VAT group meant that that group must, for the purposes of the application of the ML, be regarded as a taxable person separate from that branch. Danske Bank, Sverige Filial, also sought to ascertain whether the services supplied by the VAT group, the costs of which are attributed to it, should be regarded as supplies of services for VAT purposes and whether it had to pay VAT in Sweden, as the recipient of the services.

10 By its advance ruling of 23 November 2018, the Skatterättsnämnden (Revenue Law Commission) found that the Danish VAT group at issue, of which Danske Bank's principal establishment is a member, on the one hand, and the Swedish branch of that company, on the other, were to be regarded as being two separate taxable persons. By joining the Danish VAT group in question in accordance with Danish legislation, for VAT purposes, Danske Bank's principal establishment separated from its Swedish branch. The Skatterättsnämnden (Revenue Law Commission) also found that the services provided by Danske Bank's principal establishment, the costs of which are attributed to the Swedish branch, must be regarded as supplies of services for the purposes of VAT.

11 The Swedish branch of Danske Bank challenged the advance ruling issued by the Skatterättsnämnden (Revenue Law Commission) before the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), arguing that Danske Bank's principal establishment and that branch should be regarded as a single taxable person and that the services made available to the branch by that principal establishment should not be regarded as supplies for VAT purposes. That branch does not perform any independent economic activity and is not part of a VAT group in Sweden, with the result that it cannot be separated from the principal establishment concerned.

12 Skatteverket requested confirmation of that advance ruling. Under Danish legislation, only establishments located in Denmark may become members of a Danish VAT group. Accordingly, the Swedish branch of Danske Bank is not part of that group, so that it cannot be regarded as forming a single taxable person together with the principal establishment of that company.

13 The referring court observes that two interpretations of the relevant provisions are possible. The first interpretation of those provisions is that, in accordance with the case-law arising from the judgment of 23 March 2006, *FCE Bank* (C?210/04, EU:C:2006:196), the Swedish branch, which is not independent of Danske Bank's principal establishment and is not part of a VAT group in Sweden, is part of the same taxable person as that establishment, even if the latter is a member of a Danish VAT group. A second possible interpretation is to take the view that, by joining the

Danish VAT group in question, for VAT purposes, Danske Bank's principal establishment was separated from the taxable person which that establishment and the Swedish branch are, in principle, deemed together to constitute as regards the transactions carried out between them.

14 Thus, in its judgment of 17 September 2014, *Skandia America (USA), filial Sverige* (C?7/13, EU:C:2014:2225), the Court held that a branch which is not independent of the principal establishment of a foreign company, but which belongs to a VAT group in a Member State, forms a single taxable person with the members of that group, so that the services supplied to it for consideration by the principal establishment must be regarded as being made for the benefit not of the branch but of the VAT group. Accordingly, they are transactions between two separate taxable persons. That judgment concerns a situation in which the branch is a member of a VAT group, while, in the present case, it is the principal establishment which forms part of such a group.

15 The referring court also refers to the guidelines resulting from the 105th meeting of the VAT Committee of 26 October 2015, from which it is apparent that that committee considered, by a large majority, that in a case such as that before it, the VAT group to which the principal establishment in one Member State belongs and the branch situated in another Member State must be regarded as being two separate taxable persons.

16 In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does a Swedish branch of a bank established in a Member State other than [the Kingdom of] Sweden constitute an independent taxable person where the principal establishment supplies services to the branch and imputes the costs thereof to the branch, if the principal establishment is part of a VAT group in the other Member State, while the Swedish branch is not a member of any Swedish VAT group?'

Consideration of the question referred

17 By its question, the referring court asks whether Article 9(1) and Article 11 of the VAT Directive must be interpreted as meaning that, for VAT purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group formed on the basis of Article 11, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch.

18 To answer that question, it must be borne in mind that, under Article 2(1)(c) of the VAT Directive, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT.

19 Under the first subparagraph of Article 9(1) of that directive, 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the purpose or result of that activity.

20 In the case of a supply between the principal establishment of a company, situated in one Member State, and a branch of that company located in another Member State, the Court has held that such a supply is taxable only if there is a legal relationship between the provider of the service and the recipient in which there is reciprocal performance. In the absence of any legal relationship between a branch and its principal establishment, which, together, form a single taxable person, reciprocal performance between those entities constitutes non-taxable internal flows of funds, unlike taxed transactions carried out with third parties (judgment of 24 January 2019, *Morgan Stanley & Co International*

, C?165/17, EU:C:2019:58, paragraphs 37 and 38 and the case-law cited).

21 In order to establish whether such a legal relationship exists, it is necessary to ascertain whether the branch performs an independent economic activity. It is necessary in that regard to determine whether that branch may be regarded as independent, in particular in that it bears the economic risk arising from its business (judgment of 23 March 2006, *FCE Bank*, C?210/04, EU:C:2006:196, paragraph 35, and of 24 January 2019, *Morgan Stanley & Co International*, C?165/17, EU:C:2019:58, paragraph 35 and the case-law cited).

22 However, as regards the classification of the legal relationship between the principal establishment and the branch of a company, it is also necessary to take into account whether those companies belong to a VAT group constituted under the first paragraph of Article 11 of the VAT Directive.

23 Under that provision, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.

24 The very wording of Article 11 contains a territorial limitation, such that a Member State may not provide for a VAT group to include persons established in another Member State. As is apparent from the documents before the Court, under the Danish legislation transposing that provision, only permanent establishments situated in Denmark may form part of a Danish VAT group.

25 As regards the effects of belonging to a VAT group constituted under Article 11 of the VAT Directive, the Court has held that such a group forms a single taxable person. Treatment as a single taxable person precludes the members of the VAT group from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations (judgment of 17 September 2014, *Skandia America (USA), filial Sverige*, C?7/13, EU:C:2014:2225, paragraphs 28 and 29 and the case-law cited).

26 It follows that, where the principal establishment and branch of a company are situated in different Member States and one belongs to a VAT group, the legal relationship between them must be assessed by taking account, first, of the fact that that group is placed on the same footing as a single taxable person and, second, of the territorial limits of that group.

27 In that regard, the Court has found that services supplied by a principal establishment in a non-Member State to its branch established in a Member State constitute taxable transactions when the branch is a member of a VAT group (judgment of 17 September 2014, *Skandia America (USA), filial Sverige*, C?7/13, EU:C:2014:2225, paragraph 32). The principle set out in that judgment also applies where the services are supplied between a principal establishment situated in one Member State and belonging to a VAT group within that Member State and a branch established in another Member State.

28 In the present case, Danske Bank’s principal establishment is part of the Danish VAT group at issue. As a result of the fact that it belongs to that VAT group, it must be held, for VAT purposes, that it is that group which supplies the services at issue in the main proceedings.

29 Furthermore, having regard to the territorial limits resulting from the first paragraph of Article 11 of the VAT Directive, the Swedish branch of Danske Bank cannot be regarded as forming part of the Danish VAT group in question.

30 Accordingly, for VAT purposes, the Danish VAT group to which Danske Bank's principal establishment belongs, on the one hand, and the Swedish branch of that company, on the other, cannot be regarded as forming together a single taxable person.

31 None of the arguments put forward by Danske Bank is capable of calling that finding into question.

32 First of all, Danske Bank submits that the situation which gave rise to the judgment of 17 September 2014, *Skandia America (USA), filial Sverige* (C?7/13, EU:C:2014:2225), and that at issue in the main proceedings are different, which justifies different treatment. Neither the fact that, in the main proceedings, unlike the situation in the case which gave rise to that judgment, it is not the branch, but Danske Bank's principal establishment which forms part of the VAT group, nor the fact that that principal establishment is situated not in a third State, but in a Member State, is capable of calling into question the solution adopted in that judgment, having regard to the territorial restrictions applicable to groups laid down under Article 11 of the VAT Directive.

33 Next, contrary to the submissions made by Danske Bank, although the wording of Article 11 of the VAT Directive precludes a Member State from extending the scope of a VAT group to entities established outside its territory, the fact remains that the existence of a VAT group in that Member State must, where appropriate, be taken into account for the purposes of taxation in other Member States, in particular when the latter assess the tax obligations of a branch established in their territory.

34 Finally, with regard to the principle of fiscal neutrality, on which Danske Bank also relied, it must be borne in mind that it is a fundamental principle of the common system of VAT, which precludes similar economic transactions, which are therefore in competition with each other, from being treated differently for VAT purposes (see, to that effect, judgment of 22 May 2008, *Ampliscientifica and Amplifin*, C?162/07, EU:C:2008:301, paragraph 25 and the case-law cited). Having regard to the effects of the formation of a VAT group and its territorial boundaries, a transaction between Danske Bank's branch in Sweden and the Danish VAT group at issue, to which that company's principal establishment belongs, cannot be regarded as similar to a transaction between a branch and a principal establishment which is not part of a VAT group.

35 In the light of all the foregoing considerations, the answer to the question referred is that Article 9(1) and Article 11 of the VAT Directive must be interpreted as meaning that, for VAT purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group formed on the basis of Article 11, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch.

Costs

36 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 (Seventh Chamber) hereby rules:

Article 9(1) and Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, for value added tax (VAT) purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group formed on the basis of Article 11, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes

the costs thereof to the branch.

[Signatures]

* Language of the case: Swedish.