Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 25 June 2020 [1]

Case C-459/19

The Commissioners for Her Majesty's Revenue & Customs
v
Wellcome Trust Ltd

(Request for a preliminary ruling from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom))

(Reference for a preliminary ruling — Taxation — Value Added Tax — Directive 2006/112 — Articles 43, 44 and 45 — Place of supply of services to a taxable person acting as such — Place of supply of investment management services received by a charitable organisation for non-economic business activity from suppliers established outside the European Union)

I. Introduction

1. This request for a preliminary ruling concerns inter alia the interpretation of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2] as amended by Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services [3] ('the VAT Directive').

2. The request has been made in a dispute between the Commissioners for Her Majesty's Revenue & Customs ('HMRC') and Wellcome Trust Ltd ('WTL'), a taxable person, concerning the place of supply of investment management services received by WTL from suppliers established outside the European Union. [4]

3. WTL is a charitable organisation of long standing which is extremely generously endowed. As might be expected, WTL uses the services of investment managers to assist it in managing that large endowment portfolio. Those endowments generate very significant annual income which is then disbursed by WTL by way of grants for the purposes of medical and pharmaceutical research.

1 Original language: English.

2 OJ 2006 L 347, p. 1.

3 OJ 2008 L 44, p. 11.

4 The amount of VAT in issue in the dispute in the main proceedings is 13 113 822.00 pounds sterling (GBP) (approximately 14 530 000.00 euros). WTL wishes to recover input tax on the cost of services supplied by suppliers established outside the European Union in relation to its investments.

4. It was in this context that WTL used the investment management services of suppliers established outside the European Union for certain investment activities, activities which the Court has already held, in a case involving WTL, amount to non-economic activities for VAT purposes.[5] It is accepted that WTL did not use those services for taxable supplies within the meaning of Article 2(1)(c) of the VAT Directive, essentially because it was simply an investor, rather than a professional trader. It is also accepted that WTL is *not* 'a taxable person acting as such' for the purposes of Article 2(1)(c) of the VAT Directive, when it itself engages in investment activities.

5. The key question posed by the referring court is whether, in such circumstances, WTL is nonetheless 'a taxable person *acting as such*' within the meaning of Article 44 of the VAT Directive, even if it is not such for the purposes of Article 2(1)(c). An answer to this question is necessary in order to determine the place of supply of the services in question and whether VAT was in fact due by WTL in respect of those services.

6. In answering this question, the Court must determine, inter alia, whether or not the term 'a taxable person acting as such' has the same meaning when used in Article 2(1)(c) of the VAT Directive and in Article 44 of that directive. Before proceeding further, however, it is necessary first to set out the relevant legal framework.

II. Legal framework

A. European Union law

7. Article 2 of the VAT Directive provides:

'1. 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;

…'

8. Article 9(1) of the VAT 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.

…'

9. Chapter 3 of Title V of the VAT Directive is entitled 'Place of supply of services'.

10. Section 1 of that chapter, entitled 'Definitions', contains Article 43, which provides:

'For the purpose of applying the rules concerning the place of supply of services:

1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

5 See judgment of 20 June 1996, *Wellcome Trust* (C-155/94, EU:C:1996:243; 'the judgment in *Wellcome Trust*').

2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.'

11. Section 2 of that chapter, entitled 'General rules', provides:

'Article 44

The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

Article 45

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.'[6]

12. Article 196 of the VAT Directive, which is contained in Title XI, entitled 'Obligations of taxable persons and certain non-taxable persons', provides:

'VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.'[7]

13. Article 19 of 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[8] ('the Implementing Regulation'), entitled 'Capacity of the customer', provides:

'For the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of Directive 2006/112/EC, a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person.

Unless he has information to the contrary, such as information on the nature of the services provided, the supplier may consider that the services are for the customer's business use if, for that transaction, the customer has communicated his individual VAT identification number.

6 Recital 4 of Directive 2008/8 provides that 'for supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the recipient is established, rather than where the supplier is established. For the purposes of rules determining the place of supply of services and to minimise burdens on business, taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them. Similarly, non-taxable legal persons who are identified for VAT purposes should be regarded as taxable persons. These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff'. Recital 5 of Directive 2008/8 provides that 'where services are supplied to non-taxable persons, the general rule should continue to be that the place of supply of services is the place where the supplier has established his business'.

7 See recital 7 of Directive 2008/8, which provides that 'where a taxable person receives services from a person not established in the same Member State, the reverse charge mechanism should be obligatory in certain cases, meaning that the taxable person should self-assess the appropriate amount of VAT on the acquired service'.

8 OJ 2011 L 77, p. 1.

Where one and the same service is intended for both private use, including use by the customer's staff, and business use, the supply of that service shall be covered exclusively by Article 44 of Directive 2006/112/EC, provided there is no abusive practice.'

B. United Kingdom law

14. The relevant place of supply rules have been implemented in UK law in Section 7A of the Value Added Tax Act 1994 ('the VATA'), which provides:

'Place of supply of services

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made—

(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b) otherwise, in the country in which the supplier belongs.

…

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—

(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,

(b) is registered under this Act,

(c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or

(d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax,

and the services are received by the person otherwise than wholly for private purposes.'

III. The facts of the main proceedings and the request for a preliminary ruling

15. WTL is the sole trustee of a charitable trust, the Wellcome Trust, which makes grants for medical research. It receives income from its investments and it also has a number of comparatively minor activities including sales, catering and rental of properties in respect of which it is registered for VAT. The investment income it receives is predominantly from overseas investments in relation to which WTL utilises the services of investment managers from both within and outside the European Union. That investment income is, as I have already indicated, the source of the majority of the funding for the grants that WTL provides.

16. In the judgment in *Wellcome Trust*, the Court held that the concept of economic activities within the meaning of Article 4(2) of the 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 [9] ('the Sixth VAT Directive') (now Article 9(1) of the VAT Directive) did not include an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust.

17. The referring court indicated in its preliminary reference that, as a consequence of the ruling of the Court in the judgment in *Wellcome Trust*, WTL was denied input tax recovery in respect of the entirety of the investment management service costs incurred in relation to its non-European Union portfolio.

18. WTL and HMRC both agree that WTL's activities are substantially unchanged from those considered in the judgment in *Wellcome Trust*. Moreover, when WTL purchased the investment services in question from non-European Union suppliers it did so exclusively for the purposes of its non-economic business activity. It did not provide its VAT number to any of the suppliers from whom those services were purchased. WTL and HMRC also agree that WTL is a taxable person within the meaning of Articles 2 and 9 of the VAT Directive and that its non-economic activities are not private activities, but rather business activities. It is also common ground that WTL did not use those services for taxable supplies within the meaning of Article 2(1)(c) of the VAT Directive.

19. Under the Scheme of the Wellcome Trust, WTL is required to have paramount regard to the charitable status of the Trust and is prohibited, amongst other things, from engaging in trade.

20. From 2010 onwards, WTL accounted for VAT on the services in question under the reverse charge mechanism [10] on the basis that the place of supply was the United Kingdom.

21. Between April 2016 and June 2017, WTL submitted claims under Section 80 of the VATA claiming that it had overaccounted for output tax in relation to the services in question on the basis that, following the judgment in *Wellcome Trust*, WTL is a taxable person under Articles 2 and 9 of the VAT Directive but is not a taxable person acting as such within the meaning of Article 44 of the VAT Directive where it is engaged in the investment activities which are substantially unchanged from those considered by the Court in that judgment.

22. In a judgment dated 10 October 2018, the First-tier Tribunal (Tax Chamber) (United Kingdom) [11] decided that the services in question did not come within Article 44 of the VAT Directive because the words 'acting as such' effectively excluded WTL from its scope. According to that court, it was not necessary that supplies (which did not fall within the specific rules set out in Articles 46 to 59a of the VAT Directive) had to fall within either Article 44 or Article 45 of the VAT Directive. The First-tier Tribunal (Tax Chamber) considered that that did not give rise to legal uncertainty because Article 18 of the Implementing Regulation meant that a supplier could rely on whether the customer had provided its VAT number in order to determine whether it ought to apply VAT to its supplies. The First-tier Tribunal (Tax Chamber) considered that the United Kingdom's implementation of Article 44 of the VAT Directive pursuant to Section 7A of the VATA, which identified the place of supply as the United Kingdom on the basis that WTL was a taxable person acting in a business capacity, did not comply with Article 44 of the VAT Directive.

23. On the 15 February 2019, HMRC appealed to the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) against the judgment of the First-tier Tribunal (Tax Chamber) in this matter.

9 OJ 1977 L 145, p. 1.

10 See Article 196 of the VAT Directive.

11 Wellcome Trust Ltd [2018] UKFTT 0599 (TC).

24. The referring court considers that the key question to be addressed by the Court is whether in such circumstances it can be said that WTL is a 'taxable person acting as such' within the meaning of Article 44 of the VAT Directive.

25. HMRC claimed that Article 44 of the VAT Directive applies, in particular, first, on the basis of the language and aim of the provision and related provisions and, second, on the basis that for reasons of legal certainty a place of supply must be identifiable. As there is no claim that the supplies come within Article 45 of the VAT Directive or that any of the specific rules set out in Articles 46 to 59a of that directive apply, it follows that Article 44 must apply.

26. WTL argued that as it is not a taxable person 'acting as such' within the meaning of Article 2(1) of the VAT Directive, it is also followed that it is not a taxable person 'acting as such' within the meaning of Article 44.

27. In those circumstances the Upper Tribunal (Tax and Chancery Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 44 of [the VAT Directive] to be interpreted as meaning that when a taxable person carrying on a non-economic activity consisting of the purchase and sale of shares and other securities in the course of the management of the assets of a charitable trust acquires a supply of investment management services from a person outside of the Community exclusively for the purposes of such activity, it is to be regarded as "a taxable person acting as such"?

(2) If Question 1 is answered in the negative and Articles 46 to 49 of the [VAT] Directive do not apply, does Article 45 of the [VAT] Directive apply to the supply or does neither Article 44 or Article 45 apply to the supply?'

IV. Procedure before the Court

28. Written observations on the questions referred by Upper Tribunal (Tax and Chancery Chamber) were lodged by WTL, Ireland, the Spanish and United Kingdom Governments and the European Commission.

29. At the end of the written part of the procedure, the Court, by decision of 24 March 2020, considered that it was necessary to ask a number of questions to the parties. The parties acceded to that request and replied to those questions within the timeframe set by the Court.

V. Competence of the Court

30. The United Kingdom left the European Union at midnight (CET) on 31 January 2020. In accordance with Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement'), the Court remains competent to rule on requests for a preliminary reference lodged by courts and tribunals of the United Kingdom before the transition period as defined in Article 126 of that agreement ends, which is, in principle, on 31 December 2020.

31. Moreover, pursuant to Article 89 of the Withdrawal Agreement, the judgment of the Court in the present case, which will be handed down at a future date, will have binding force in its entirety on and in the United Kingdom.

32. The present request for a preliminary ruling was lodged at the registry of the Court on 13 June 2019. The Court thus remains competent to rule on the present request for a preliminary ruling and the Upper Tribunal (Tax and Chancery Chamber) is bound by the judgment to be handed down by the Court in the present proceedings.

VI. Preliminary remarks

A. Case C-155/94, Wellcome Trust

33. As I have already indicated, the present request for a preliminary ruling has its origins in the judgment in *Wellcome Trust* and in an amendment to the VAT Directive introduced by Article 2 of Directive 2008/8 with effect on 1 January 2010.

34. It is clear from the wording of Article 2(1) of the VAT Directive that a taxable person must act 'as such' for a transaction to be subject to VAT.[12]

35. In the judgment in *Wellcome Trust* , the Court found that the investment activities of WTL,[13] which consisted essentially in the acquisition and sale of shares and other securities with a view to maximising the dividends and capital yields destined for the promotion of medical research, did not constitute economic activities within the meaning of Article 4(2) of the Sixth VAT Directive (now Article 9(1) of the VAT Directive). Given that WTL could not engage in trade, the Court considered that 'irrespective whether the activities in question are similar to those of an investment trust or a pension fund, the conclusion must be that a trust which is in a position such as that described by the referring tribunal must … be regarded as confining its activities to managing an investment portfolio in the same way as a private investor'.[14] In paragraph 41 of that judgment, the Court thus held that the concept of economic activities, within the meaning of that provision is to be interpreted as *not* including an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust.

36. It is, moreover, clear from the Court's judgment of 29 April 2004, *EDM* (C-77/01, EU:C:2004:243, paragraphs 60 to 70), which referred to the judgment in *Wellcome Trust*, that the simple sale of shares and other negotiable securities, such as holdings in investment funds, and the yield from placements in investment funds do not come within the scope of the VAT Directive. It is also clear that such transactions do not constitute economic activities carried out by a taxable person acting as such within the meaning of Article 2(1) of the VAT Directive.[15]

B. Directive 2008/8

37. In paragraphs 28 to 29 of the judgment of 13 March 2019, *Srf konsulterna* (C-647/17, EU:C:2019:195), the Court stated that the purpose of the provisions of the VAT Directive which determine the place where services are deemed to be supplied is to avoid, first, conflicts of jurisdiction which may result in double taxation and, second, non-taxation of otherwise taxable services.[16]

12 Judgment of 4 October 1995, *Armbrecht* (C-291/92, EU:C:1995:304, paragraph 16). A taxable person acts in the capacity of a 'taxable person acting as such' where it carries out transactions in the course of its taxable activity (see judgment of 12 January 2006, *Optigen and Others*, C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 42). A taxable person performing a transaction in a private capacity does not act as a taxable person. A transaction performed by a taxable person in a private capacity is not, therefore, subject to VAT (see judgment of 4 October 1995, *Armbrecht*, C-291/92, EU:C:1995:304, paragraphs 17 and 18).

13 Which remain substantially unchanged today.

14 See paragraph 36 of the judgment in *Wellcome Trust*.

15 See, also, paragraph 30 of the judgment of 15 September 2016, *Landkreis Potsdam-Mittelmark* (C-400/15, EU:C:2016:687), in which the Court stated that non-economic activities do not fall within the scope of the Sixth VAT Directive.

16 See, also, judgment of 22 October 2009, *Swiss Re Germany Holding* (C-242/08, EU:C:2009:647, paragraph 32).

38. Prior to the entry into force of Article 2 of Directive 2008/8 on 1 January 2010 (which amended Chapter 3 of Title V to the VAT Directive), the place of supply of services was deemed, in accordance with Article 43 of the VAT Directive then in force, to be, inter alia, *the place where the supplier had established his or her business*. As indicated by the Commission in its observations, this rule applied irrespective of the identity or the nature of the recipient of the services.

39. In the wake of the amendments introduced by Article 2 of Directive 2008/8, the underlying logic of the provisions of the VAT Directive concerning the place where a service is deemed to be supplied is that the services should be taxed as far as possible at the place of consumption. [17]

40. Following the amendments to the Chapter 3 of Title V to the VAT Directive introduced by Article 2 of Directive 2008/8, in particular those concerning the place of supply of services, WTL accounted for VAT in respect of the amounts paid by it for services provided by investment managers established outside the European Union in accordance with the reverse charge mechanism laid down in Article 196 of the VAT Directive on the basis that the place of supply of those services was the United Kingdom. [18] Those reverse charge provisions specifically refer to Article 44 of the VAT Directive.

41. In the main proceedings, WTL now seeks a refund of the sums which it has paid. In its observations to the Court, WTL claims that the United Kingdom has incorrectly transposed Article 44 of the VAT Directive in Section 7A of the VATA because, while Article 44 of the VAT Directive expressly provides a clear capacity test which draws a line between economic and non-economic activity, Section 7A of the VATA draws an entirely different distinction, namely, between private use and business use, which has no basis in the VAT Directive.

42. WTL considers that the words 'a taxable person acting as such' in Article 44 of the VAT Directive require that the recipient of services use those services for the purpose of its economic activity. In that regard, WTL points to the fact that in the judgment in *Wellcome Trust* , the Court found, that when it engaged in its investment activities, WTL was not a 'taxable person acting as such' within the meaning of Article 2(1)(c) of the VAT Directive. [19]

43. It may be noted at the outset that WTL does not claim that one of the 'Particular provisions' relating to the place of supply in Section 3 of Chapter 3 of the VAT Directive and contained in Article 46 to Article 59a of that directive applies to it. [20]

44. It is therefore necessary to focus in this Opinion instead on the definitions of place of supply of services contained in Article 43 of the VAT Directive and the general rules on place of supply of services contained in Articles 44 and 45 of the VAT Directive.

17 See recital 3 of Directive 2008/8, which provides that 'for all supplies of services the place of taxation should, in principle, be the place where the actual consumption takes place. If the general rule for the place of supply of services were to be altered in this way, certain exceptions to this general rule would still be necessary for both administrative and policy reasons'.

18 It must be noted that there is nothing in the request for a preliminary ruling that would tend to indicate that the place of consumption of the services in question in the main proceedings is anywhere other than the United Kingdom. While it has not been so indicated in the request for a preliminary ruling, one must presume that WTL's business is established in the United Kingdom.

19 See point 19(ii) of the request for a preliminary ruling and point 7 of WTL's written observations to the Court.

20 Recital 6 of Directive 2008/8 provides that 'in certain circumstances, the general rules as regards the place of supply of services for both taxable and non-taxable persons are not applicable and specified exclusions should apply instead. These exclusions should be largely based on existing criteria and reflect the principle of taxation at the place of consumption, while not imposing disproportionate administrative burdens upon certain traders'.

VII. First question

45. By its first question, the referring court asks the Court to interpret Article 44 of the VAT Directive concerning the place of supply of services and to determine, in essence, whether a taxable person, such as WTL, which essentially carries out a non-economic business activity must be regarded as 'a taxable person acting as such' when it acquires services from outside the European Union for the purposes of that activity.

A. Observations of the parties

46. WTL considers that the phrase 'taxable person *acting as such*' presupposes a distinction between taxable persons acting in an economic capacity and a non-economic capacity. Accordingly, Article 44 of the VAT Directive does not, on its clear wording, apply to WTL when it purchases services exclusively for the purposes of its non-economic activities from suppliers established outside the European Union.

47. WTL considers that Article 43 of the VAT Directive does not alter this position as that provision serves only to clarify that a taxable person engaged in both economic and non-economic activities always has the status of a taxable person; it does not deem the recipient to be acting in the capacity of a taxable person. WTL stresses the fact that the words 'acting as such' are absent from Article 43 of the VAT Directive. Accordingly, Article 43 of the VAT Directive deals with status alone and does not contain a capacity test. Given that the words 'acting as such' are contained in Article 44 of the VAT Directive, WTL contends that the Union legislature introduced a capacity test in that provision. WTL also claims that, in accordance with Articles 18 and 55 of the Implementing Regulation, where a taxable person is not acting as such and does not provide its VAT number to suppliers, those suppliers are legislatively entitled to charge VAT in the jurisdiction where they are established. This raises the spectre of double taxation where the national tax authority of the recipient taxable person's Member State, in relation to the same supplies, seeks to levy tax.

48. WTL also considers that it cannot be inferred from Article 19 of the Implementing Regulation that, for the purposes of Article 44 of the VAT Directive, WTL is to be regarded as a 'taxable person acting as such' as there is nothing in Article 19 that expressly provides that the private use exclusion is an exhaustive and exclusive expression of the seminal phrase 'acting as such'.

49. In addition, WTL considers that any construction of Articles 43 and 44 of the VAT Directive which places it in a position different from that of a private investor would be difficult to reconcile with the judgment in *Wellcome Trust*. It would place WTL in a uniquely invidious position as such an interpretation would require that party to self-account for VAT as though it were engaged in economic activity but to be denied input tax deduction on the basis that it is carrying out an activity equivalent to that of a private individual. There is nothing in the VAT Directive to suggest that charitable bodies were intended to be penalised in this way.

50. All the other parties which intervened in these proceedings before the Court consider that Article 44 of the VAT Directive must be interpreted as meaning that a taxable person such as WTL which carries out a non-economic business activity must be regarded as 'a taxable person acting as such' when it acquires services from outside the European Union for the purposes of that activity.

B. Analysis

51. The focus of the first question is on the use of the terms 'a taxable person *acting as such*' in Article 44 of the VAT Directive and whether the inclusion of the specific words 'acting as such' — which also appear in other provisions of the VAT Directive — has the effect of excluding WTL from the scope of that provision and from the requirement to account for VAT on investment management services supplied to it by suppliers established outside the European Union. In essence, WTL claims that Article 44 of the VAT Directive only applies to taxable persons who purchase services for their taxable supplies and that this provision does *not* apply when it receives investment management services from persons established outside the European Union for the purposes of its non-economic business activity.

52. In paragraphs 20 and 21 of the judgment of 13 March 2019, *Srf konsulterna* (C-647/17, EU:C:2019:195), the Court stated that Articles 44 and 45 of the VAT Directive contain a general rule for determining the place where services are deemed to be supplied for tax purposes, while Articles 46 to 59a of that directive provide a number of specific instances of such places. Moreover, Articles 44 and 45 of the VAT Directive do not take precedence over Articles 46 to 59a thereof. In every situation, the question which arises is whether that situation is covered by one of the cases mentioned in Articles 46 to 59a of that directive. Critically, however, the Court held that if it does not, then the situation necessarily falls within the scope of Articles 44 and 45 of that directive.

53. It is common ground that Articles 46 to 59a of the VAT Directive are not applicable in the main proceedings. It would appear therefore from the judgment of 13 March 2019, *Srf konsulterna* (C-647/17, EU:C:2019:195), that either Article 44 or Article 45 of the VAT Directive must, accordingly, be applicable. WTL claims, however, that neither Article 44 nor, for that matter, Article 45 of the VAT Directive apply in respect of the supplies at issue. [21]

54. For my part, however, I cannot agree.

55. As I indicated earlier, the current version of Articles 43 to 45 of the VAT Directive was introduced into Directive 2006/112 by Article 2 of Directive 2008/8. Given the requirements of unity and coherence of the European Union legal order, the concepts used by Directives 2006/112 and 2008/8 should, at least in principle, have the same meaning, unless the Union legislature has, in a specific legislative context, expressly indicated a different intention. [22] On that basis, it would follow, that the term 'a taxable person acting as such' in Article 2(1)(c) and Article 44 of the VAT Directive should have, as WTL contends, the same meaning and effect.

21 Ireland stated that such an approach would be patently contrary to the objective of legal certainty pursued by the place of supply rules laid down in the VAT Directive and would be incompatible with the requirement that a supply must fall within one of the rules. The United Kingdom Government submits that none of the place of supply articles support the view that the place of supply of services to a taxable person who is not acting exclusively in a private capacity but in a business capacity (that is, a person such as WTL) can be the place where the supplier is established. That government considers that there is no support for such a position in Articles 43, 44, 45 of the VAT Directive or Article 19 of the Implementing Regulation. It notes that WTL itself does not point to any provision in the VAT Directive, in the Implementing Regulation or in any case-law that supports such a conclusion. WTL's position that Article 44 of the VAT Directive has no application to services received by it therefore means that, when WTL receives services from another Member State, not only is the United Kingdom not the place of supply but neither is that other Member State. The United Kingdom Government considers that this effect of non-taxation is the opposite of what the place of supply rules aim to achieve.

22 See, by analogy, judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraphs 28 to 34). See, in a VAT context, judgment of 15 September 2016, *Landkreis Potsdam-Mittelmark* (C-400/15, EU:C:2016:687, paragraph 37). See, also, paragraph 31 of judgment of 22 October 2009, *Swiss Re Germany Holding* (C-242/08, EU:C:2009:647), where the Court stated that sound functioning and uniform interpretation of the common system of VAT require that the concepts of 'insurance transactions' and 'reinsurance' in Articles 9(2)(e), fifth indent, and 13B(a) of the Sixth Directive are not defined differently depending on whether they are used in one of those provisions or the other. It must, however, be stressed that the Court further stated in paragraph 32 of that judgment that 'the services referred to in the fifth indent of Article 9(2)(e) of the Sixth Directive are Community concepts which must be interpreted uniformly *in order to avoid instances of double taxation or non-taxation which may result from different interpretations*'. Emphasis added. The requirement of uniform interpretation is not, in my view, a goal in itself but rather is guided by the overarching principle of avoiding instances of double taxation or non-taxation.

56. In my view, however, such an interpretation of Article 44 of the VAT Directive, which focuses on the term 'acting as such' in isolation from the surrounding words, cannot be accepted.[23] While, as I have just indicated, there is a general presumption that words and phrases as they appear in different places in a particular directive should generally bear the same meaning, this cannot be at the expense of the more fundamental rule as to context. Words and phrases necessarily derive colour and meaning from the words which surround them and, in particular, from the specific context in which they appear. My fundamental reason for disagreement with WTL's claim, therefore, is that it fails to take account of the particular context in which the words occur and the objective pursued by the rules of which they form part.[24]

57. Article 44 of the VAT Directive forms part of the new rules for determining the place of supply of services which were introduced by Directive 2008/8 with a view to modernising and simplifying those rules and that provision must be read and interpreted in that specific context.[25] I consider that Article 44 of the VAT Directive cannot be read separately and divorced from the contents of Article 43 of that directive.

58. In that regard, it is important to note that Article 43 of the VAT Directive contains two specific deeming provisions. First, it deems a taxable person to be such in respect of the supply of *all* services rendered to him or her (irrespective of whether they would *otherwise* be taxable services for the purposes of Article 2(1) or not). Second, it deems *a non-taxable legal person* who is identified for VAT purposes (such as WTL) as a taxable legal person but *only* for the purpose of applying the rules concerning the place of supply of services, even if they are not so deemed for other purposes.[26] In both instances, the deeming provisions contained in Article 43 are limited in their scope. They are expressed not to be deeming clauses for *all* purposes, but rather simply for the purposes of the rules concerning the places of supply of services. One must, I think, have regard to the artificial nature of a deeming provision of this kind: in this instance Article 43(2) of the VAT Directive is really a convenient method of legislative drafting whereby the Union legislator has provided that the rules relating to the places of supply of services which apply to ordinary taxable persons shall also apply in this instance to non-taxable legal persons identified for VAT.

59. The general rules concerning the place of supply of services to 'a taxable person', as specifically defined by Article 43 of the VAT Directive, and to 'a non-taxable person'[27] are thus contained in Article 44 and Article 45 of that directive respectively. One cannot, I think, overlook these critical definitions of what constitutes 'a taxable person' contained in Article 43 of the VAT Directive so far as the interpretation of Article 44 and, by implication, Article 45 of that directive respectively, the necessary artificiality of these deeming clauses notwithstanding.

23 It must be noted that the Commission itself has referred to the use of the terms 'acting as such' in Article 44 of the VAT Directive as 'clumsy'. I would note that the problem is not limited to the English language version of the VAT Directive. Thus, the same problem arises, for example, in French ('agissant en tant que tel'), in Italian ('che agisce in quanto tale'), in Portuguese ('agindo nessa qualidade'), in Spanish ('que actúe como tal') and in German ('als solcher … erbringt/als solcher handelt').

24 Judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 41). In paragraph 50 of that judgment, the Court stated that Article 44 of the VAT Directive is a rule determining the place of taxation of supplies of services by designating the point of reference for tax purposes, and consequently delimiting the competences of the Member States.

25 See recital 2 of Directive 2008/8.

26 Moreover, Article 196 of the VAT Directive confirms that VAT is payable by any taxable person, *or non-taxable legal person identified for VAT purposes*, to whom the services referred to in Article 44 of that directive are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.

27 I would note in that regard that Article 43 of the VAT Directive does not specifically define the concept of 'a non-taxable person' for the purposes of the application of the rules on the place of supply of services contained in Chapter 3 of Title V of that directive. Given the broad definitions of a taxable person in that regard contained in Article 43 of the VAT Directive, a non-taxable person is, in essence, defined by implication or by default for the purposes of the application of the rules on the place of supply of services and in particular Article 45 of that directive.

60. The inclusion of certain non-taxable activities and non-taxable persons in the definition of taxable person and the use of the term 'all' in Article 43 of the VAT Directive indicates the intent of the Union legislature to cast the net very broadly in relation to the scope of application of the 'destination rule' contained in Article 44 of that directive.

61. Recital 4 of Directive 2008/8,[28] further clarifies the scope of both Article 43 and Article 44 of the VAT Directive and confirms that the rules in relation to the place of supply of services to taxable persons 'should not extend to supplies of services received by a taxable person for his own personal use or that of his staff'.

62. It follows that all services rendered to a taxable person as defined in Article 43 of the VAT Directive, with the exception of those received for private purposes, are deemed to be supplied at the place where the recipient is established. I therefore consider that the Commission has correctly indicated that the very objective of Article 43(1) of the VAT Directive is to ensure that taxable persons are to be treated in this fashion for the purposes of the place of supply rules *even* in respect of services used for activities or transactions which are not considered to be taxable supplies in accordance with Article 2(1) of that directive.[29]

63. This interpretation is also consistent with the first paragraph of Article 19 of the Implementing Regulation, which provides that 'for the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of [the VAT Directive], a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person'. While the provisions of the VAT Directive cannot be interpreted by reference to a subsequent Implementing Regulation, the provisions of Article 19 are still striking.

64. Moreover, as indicated in point 41 of the Opinion of Advocate General Mazák in *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C-291/07, EU:C:2008:348) and confirmed by the Court in paragraph 31 of the judgment of 6 November 2008, *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C-291/07, EU:C:2008:609), this approach is in line with the interests of simplicity of administration of the rules in respect of the place of supply of services. This interpretation further promotes the ease of collection, as well as the prevention of tax avoidance. If the customer of services supplied were required to be a taxable person acting as such (in accordance with Article 2(1)(c) of the VAT Directive) or if the services had to be used for the purposes of his or her taxable transactions, the determination of the place of supply of services would in many cases be much more difficult, both for companies and, for that matter, for the fiscal authorities of the Member States.[30]

28 Recital 5 to Directive 2008/8 clarifies the scope of Article 45 of the VAT Directive.

29 The Spanish Government submits that Article 43(1) of the VAT Directive is a clarifying provision aimed at preventing uncertainty about the definition of 'taxable person'. However, Article 43(2) of the VAT Directive extends the status of taxable person to legal persons who are not taxable persons but who have a VAT identification number and who can be required to carry out a VAT self-assessment if they make an investment. According to the Spanish Government, Article 44 of the VAT Directive uses the phrase 'acting as such' to exclude from its scope those who are acting as individuals. In line with this, Article 19 of the Implementing Regulation provides that a taxable person who receives services exclusively for private use does not have the status of taxable person. The clear consequence flowing from this is that other taxable persons (like WTL) must continue to be treated as such. Ireland considers that the plain effect and, accordingly, the proper construction of Article 43 of the VAT Directive is that, regardless of the use to which services are put, where they are supplied to taxable persons, the place of supply rules set out in Article 44 of that directive apply in respect of the *entirety* of the services supplied.

30 It cannot be ignored that the legislative provision in question (Article 9(2)(e) of the Sixth VAT Directive) did *not* contain the term taxable person 'acting as such'. Indeed, the Court specifically relied on that fact in paragraph 29 of the judgment of 6 November 2008, *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C-291/07, EU:C:2008:609), and that simplified the task of the Court in that case greatly. The ultimate finding of the Court however was that 'where the customer for consultancy services supplied by a taxable person established in another Member State carries out both an economic activity and an activity which falls outside the scope of those directives, that customer is to be regarded as a taxable person even where the supply is used solely for the purposes of the latter activity'. I see no reason to depart from that finding in the present case despite the somewhat unfortunate legislative drafting of the Union legislature in both Articles 43 and 44 of the VAT Directive.

65. I therefore consider that Article 44 of the VAT Directive, read in the light of Article 43 and recital 4 of that directive and Article 19 of the Implementing Directive, applies in respect of the supply of *all services* to a taxable person as defined in Article 43 of the VAT Directive unless that person receives them 'for his own personal use or for that of his staff'.[31] The use of the term 'acting as such' in Article 44 of the VAT Directive serves to exclude services supplied to a taxable person, as defined in a broad sense by Article 43 of that directive, 'for his own personal use or for that of his staff'. The term 'acting as such' do not exclude from Article 44 of the VAT Directive taxable persons in receipt of services for non-economic business purposes.

66. As regards WTL's submissions in relation to Articles 18 and 19 of the Implementing Regulation summarised in points 47 and 48 of this Opinion, I find them unpersuasive. Articles 18 and 19 of the Implementing Regulation — which merely allow a supplier to draw certain inferences from the conduct of a customer,[32] such as, for example, whether the latter supplies a VAT identification number or not — cannot, as I have already observed, alter or amend the terms to Articles 43 to 45 of the VAT Directive.[33] Moreover, given that Articles 44 and 45 of the VAT Directive determine the place where services are supplied depending on whether they are supplied to a taxable[34] or non-taxable person, I consider that there is, in principle, no risk of double taxation.[35] There is, in any event, no suggestion that the services in question in the main proceedings were in fact subject to double taxation.

67. I do not consider that WTL has demonstrated that it has suffered unequal treatment or that the principle of fiscal neutrality — which is at the heart of the VAT system — has been compromised. WTL is not in a comparable situation to a private investor as it is agreed that the services in question are used for non-economic *business* activity.[36] It is settled case-law that input VAT relating to expenditure incurred by a taxpayer connected with non-economic activities cannot give rise to a right to deduct. Moreover, where a taxpayer simultaneously carries out economic activities and non-economic activities, deduction of VAT is allowed only to the extent that that expenditure is attributable to the taxpayer's economic activity.[37]

68. Indeed the Court held recently in paragraph 30 of the judgment of 3 July 2019, *The Chancellor, Masters and Scholars of the University of Cambridge* (C-316/18, EU:C:2019:559), that 'both the activity consisting in the investment of donations and endowments, and the costs associated with that investment activity must be treated in the same way for VAT purposes as the non-economic activity consisting in the collection of donations and endowments and any costs associated with the latter.

31 See, also, recital 19 of the Implementing Regulation which provides that 'when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person'.

32 Unless he or she has information to the contrary.

33 The same reasoning applies in relation to WTL's claim that it did not supply a VAT identification number pursuant to Article 55 of the Implementing Regulation as it is not a 'taxable person acting as such'. Article 55 of the Implementing Regulation must also be interpreted in the light of Article 44 of the VAT Directive.

34 As defined by Article 43 of the VAT Directive.

35 In that regard, the United Kingdom Government indicated in its reply to a question by the Court that the risk of double taxation results from conflicting interpretations of the rules being employed and the only way to overcome this difficulty is to have a uniform interpretation of the rules. The Spanish Government indicated in its reply to a question by the Court that a combined (and systematic) interpretation of Articles 43 and 44 of the VAT Directive, of recital 4 to Directive 2008/8 and Article 19 of the Implementing Regulation ensures that there is no possibility of double imposition. Ireland also indicated in its reply to a question by the Court that where a customer is correct in its self-determination of whether services received have been acquired for the purposes of its taxable activities, including where it is deemed to be a taxable person under Article 43 of the VAT Directive, double taxation ought not to arise.

36 The Commission stated in its reply to a question from the Court that WTL 'is not a private individual but is an entity that has chosen to be registered for VAT. It is treated in the same way as any other taxable person (or indeed as any non-taxable legal person which is identified for VAT purposes). That is to say, it is subject to the place of supply rules applicable to business-to business transactions. Only in the case of services received by a taxable person but used for the private consumption of its staff (or that of a taxable person who is an individual) do the rules applicable to business-to-consumer transactions apply. The services in issue received by [WTL] are not for the private consumption of an individual. It is entirely in line with the principle of equal treatment that only the private consumption of individuals falls under the latter rules'.

37 See judgment of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraphs 30 and 31). See, also, judgments of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C-515/07, EU:C:2009:88, paragraphs 36 and 37), and of 15 September 2016, *Landkreis Potsdam-Mittelmark* (C-400/15, EU:C:2016:687).

Not only does such financial investment activity constitute, for the University of Cambridge, much like a private investor, a means of generating income from the donations and endowments raised, but it is also an activity that may be directly linked to their collection and, consequently, is merely a direct continuation of that non-economic activity. Accordingly, input VAT paid in respect of the costs associated with that investment is also non-deductible'.

69. In the light of all of the above considerations, I consider that the answer to the first question is that Article 44 of the VAT Directive should be interpreted as meaning that when a taxable person carrying on a non-economic activity consisting of the purchase and sale of shares and other securities in the course of the management of the assets of a charitable trust acquires a supply of investment management services from a person outside of the European Union exclusively for the purposes of such activity, it is to be regarded as 'a taxable person acting as such' for the purposes of that provision of the directive.

VIII. Second question

70. In the light of the answer given to the first question referred for a preliminary ruling, I consider that it is not necessary to answer the second question. Moreover, given that it is common ground that WTL is a taxable person, I do not consider, nor indeed has it been argued by any of the parties to these proceedings before the Court, that Article 45 of the VAT Directive, which relates to the place of supply of services to a non-taxable person, applies to WTL.

IX. Conclusion

71. I would accordingly propose that the questions referred by the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) be answered as follows:

Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services, should be interpreted as meaning that when a taxable person carrying on a non-economic activity consisting of the purchase and sale of shares and other securities in the course of the management of the assets of a charitable trust acquires a supply of investment management services from a person outside of the European Union exclusively for the purposes of such activity, it is to be regarded as 'a taxable person acting as such' for the purposes of that provision of the directive.