Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

9 October 2019 *

(Reference for a preliminary ruling — Sixth Council Directive 77/388/EEC — Article 11A(1)(a) — Taxable amount — Subsidy directly linked to price — Regulation (EC) No 2200/96 — Article 11(1) and Article 15 — Producer organisation having set up an operational fund — Deliveries made by the producer organisation to its members in exchange for payments not covering the entirety of the purchase price — Additional financing paid by the operational fund)

In Joined Cases C-573/18 and C-574/18,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decisions of 13 June 2018, received at the Court on 13 September 2018, in the proceedings

C GmbH & Co. KG (C-573/18),

C-eG (C-574/18)

v

Finanzamt Z,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis (Rapporteur), President of the Chamber, M. Ilešič and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– the German Government, initially by T. Henze and S. Eisenberg, and subsequently by S. Eisenberg, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the European Commission, by L. Lozano Palacios and R. Pethke, acting as Agents,

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

* Language of the cases: German.

gives the following

Judgment

1 The requests for a preliminary ruling concern the interpretation of Articles 11A(1)(a) and of Articles 20 and 27 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 (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 Those requests have been made in two sets of proceedings between C GmbH & Co. KG and C-eG, on the one hand, and the Finanzamt Z (Z tax office, Germany, 'the tax office') concerning value added tax (VAT) assessment notices.

Legal context

European Union law

3 Article 11(1) of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruits and vegetables (OJ 1996 L 297, p. 1) provides:

'For the purposes of this Regulation, "producer organisation" means any legal entity:

(a) which is formed on the own initiative of growers of the following categories of product listed in Article 1(2):
(i) fruit and vegetables;

…

(c) the rules of association of which require its producer members, in particular:

…
(3) market their entire production concerned through the producer organisation.

…
(5) to pay the financial contributions provided for in its rules of association for the establishment and replenishment of the operational fund provided for in Article 15;

…'

4 Article 15(1) of Regulation 2200/96 provides:

'Community financial assistance shall be granted on the terms set out in this Article to producer organisations setting up an operational fund.

This fund shall be maintained by financial contributions levied on member producers on the basis of the quantities or value of fruit and vegetables actually marketed and from the financial assistance referred to in the first subparagraph.'

5 Article 11A(1) of the Sixth Directive stipulates:

‘The basis of assessment shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies;

…’

6 Under Article 20(1) of that directive:

‘The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

…’

7 Article 27 of that directive states:

‘1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

…

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.’

German law

8 Paragraph 1(1) of the Umsatzsteuergesetz (Law on turnover tax), in the version applicable to the disputes in the main proceedings (‘the UStG’), provides:

‘The following transactions shall be subject to value added tax:

1. supplies and other services which an undertaking performs for consideration on the domestic market in the course of its business. …

…’

9 Paragraph 3 of the UStG provides as follows:

‘(1) Supplies of goods by a trader are supplies by which he or a third party authorised by him entitles the recipient or a third party on his behalf to dispose of goods in his own name (transfer of the power of disposal).

…

(12) There is an exchange where the consideration for a supply consists in a supply. There is a transaction akin to an exchange where the consideration for a service consists in a supply or a service.'

10 Paragraph 10 of the UStG provides:

'(1) In respect of supplies of goods and services (Paragraph 1(1)(1), sentence 1) …, the transaction shall be assessed to tax in accordance with the consideration. Consideration is everything which the recipient of the supply expends (net of turnover tax) for the purpose of obtaining the supply. The consideration also includes anything that a person other than the recipient of the supply pays to the trader for the supply …

2. … In the case of exchanges (Paragraph 3(12), sentence 1), transactions akin to exchanges (Paragraph 3(12), sentence 2) …, the value of each supply constitutes the consideration for the other supply. The turnover tax shall not form part of the consideration.

…

(4) The transaction shall be assessed to tax:

1. in the case of the forwarding of goods … and in the case of supplies within the meaning of Paragraph 3(1b), on the basis of the purchase price plus the ancillary costs for the goods or for identical goods, or, in the absence of a purchase price, on the basis of the cost price, in each case as of the time of the transaction;

…

Value added tax shall not form part of the taxable amount.

(5) Subparagraph (4) shall apply *mutatis mutandis* to:

1. and services which corporations and associations of persons within the meaning of Paragraph 1(1) Nos 1 to 5 of the Körperschaftsteuergesetz (Corporation Tax Law, 'KStG') associations of persons without legal personality and communities supply in the context of their business to their equity holders, shareholders, members, partners or persons associated with them or which sole traders supply to associated persons.

2. …

if the basis of assessment under paragraph (4) exceeds the consideration under paragraph (1).'

11 Paragraph 1(1) of the KStG provides:

'The following corporations, associations of persons and pools of assets which have their management or their registered office in Germany shall have unlimited liability to corporation tax:

…

5. associations without legal personality, institutions, foundations and other special-purpose funds governed by private law;

…'

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

12 The applicant in the main proceedings in Case C-573/18 is a company with a legal form 'GmbH & Co. KG'. That company contests tax amendment notices issued for the years 2005 and 2006.

13 The applicant in the main proceedings in Case C-574/18 is a company with a legal form 'eingetragene Genossenschaft' or 'eG', namely, a registered cooperative, taking over the rights of another registered cooperative. That cooperative contests tax amendment notices issued for the years 2002 and 2003.

14 The applicants in the main proceedings were, during the years at issue, fruit and vegetable wholesalers. As 'producer organisations', within the meaning of Article 11 of Regulation No 2200/96, they sold the products grown by their producer members.

15 In accordance with Article 15 of that regulation, the applicants in the main proceedings each operated an operational fund. That fund is a special-purpose fund governed by private law within the meaning of Paragraph 1(1)(5) of the KStG and it is funded half by contributions from producer members and half by financial assistance from the European Union. The resources of that fund make it possible to finance investments in particular holdings of the members of the producer organisation.

16 To that end, the applicants in the main proceedings concluded contracts with various associated producers for the acquisition and use of capital goods. The orders for goods covered by those contracts were placed by the latter directly with upstream suppliers. Those suppliers sent them the invoices.

17 Next, the applicant in the main proceedings in Case C-573/18 invoiced the producers concerned, as the case may be, 50% or 75% of its acquisition costs plus VAT, the remaining costs being financed by the operational fund. The applicant in the main proceedings in Case C-574/18 invoiced the producers concerned 50% of its acquisition costs plus VAT, the remaining costs being financed by the operational fund.

18 Producers were required, for a specified period of time to use the acquired goods, to supply their goods to the applicants in the main proceedings for marketing purposes and to pay a contribution on the sale of their goods, called a 'financial contribution' within the meaning of Article 15 of Regulation 2200/96. That financial contribution amounted, in the case of the applicant in the main proceedings in Case C-573/18, to 1.75% of the sales price of goods and, in the case of the applicant in the main proceedings in Case C-574/18, to 3% of the sales price of goods. Those contributions financed the operational funds.

19 After the expiry of the commitment period provided for in the contracts for the acquisition and use of capital goods, the applicants in the main proceedings transferred to the producers their co-ownership rights relating to the goods acquired for no consideration.

20 The applicants in the main proceedings have, during the years at issue, deducted in full the input VAT paid on suppliers' invoices and have applied VAT to output VAT solely on the amounts invoiced to producers. They did not consider the amounts paid from the operational funds as compensation for making the goods at issue available to producers, in so far as they came from the financial assistance.

21 After carrying out a tax audit of the applicants in the main proceedings, the tax authorities took the view, in the amending tax notices for the years at issue, that the applicants in the main proceedings had, as soon as the goods were acquired, granted the various producers power of disposal over them and had, in so doing, made a supply. The tax authorities took the view that the financial aid from the operational funds was, as a genuine subsidy, non-taxable and therefore applied to the output supplies

carried out by the applicants in the main proceedings the minimum taxable amount provided for in Paragraph 10(5)(1) UStG, read in conjunction with Paragraph 10(4), and considered that the purchase price consisted of the net amounts paid to input suppliers.

22 The Finanzgericht (Finance Court, Germany) dismissed the applicants' appeal in the main proceedings against those amending tax notices. However, even if that court confirmed the tax office's conclusion, it reached that result on the basis of the third sentence of Paragraph 10(1) of the UStG. It took the view that payments from operational funds should be considered as consideration obtained from a third party.

23 The applicants in the main proceedings challenge the judgment of the Finanzgericht (Finance Court) in their appeal on a point of law ('Revision') which they have brought before the Bundesfinanzhof (Federal Court of Finance, Germany).

24 The referring court works from the principle that the amending tax notices at issue in the main proceedings, if they were to be assessed exclusively with regard to German law, would be lawful. However, it wonders whether the standards of national law comply with Union law.

25 In that regard, that court is of the view, on the one hand, that the supplies of goods made to its members by a producer organisation could be categorised as an exchange with financial compensation, since the members, in addition to a proportional payment, undertake, for a fixed period, to deliver their goods to the producer organisation. On the other hand, it takes the view that payments from operational funds could be considered to be a subsidy directly linked to the price of the supply to be included in the taxable amount.

26 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions, which are worded identically in Cases C-573/18 and C-574/18, to the Court of Justice for a preliminary ruling:

'(1) Under circumstances such as those of the main proceedings, in which a producer organisation within the meaning of Article 11(1) and Article 15 of Regulation [No 2200/96] supplies goods to the producers that are its members and receives for this from the producers a payment which does not cover the purchase price,

(a) is an exchange with a cash supplement deemed to exist because the producers, in return for the supply, have contractually undertaken vis-à-vis the producer organisation to deliver fruit and vegetables to the producer organisation for the duration of the earmarking period, with the consequence that the taxable amount of the supply is the purchase price for the capital goods paid by the producer organisation to the upstream suppliers?

(b) is the entirety of the amount which the operational fund actually pays to the producer organisation for the supply a "subsidy directly linked to the price of such supplies" within the meaning of Article 11A(1)(a) of the Sixth Directive …, with the consequence that the taxable amount also encompasses the financial assistance within the meaning of Article 15 of Regulation No 2200/96 which has been granted to the operational fund by the competent authorities on the basis of an operational programme?

(2) If, on the basis of the answer to question 1, only the payments made by the producers, but not the supply obligation and the financial assistance, are to be taken as the taxable amount: under the circumstances specified in question 1, does Article 11A(1)(a) of the [Sixth Directive] preclude a national special measure based on Article 27(1) of the [Sixth Directive] such as Paragraph 10(5)(1) of the UStG, according to which the taxable amount of the supplies to the producers is the purchase price for the capital goods paid by the producer organisation to the upstream suppliers because the producers are related parties?

(3) If question 2 is answered in the negative: is this also the case if the producers have a full right of deduction because the capital goods are subject to adjustments of deductions (Article 20 of the [Sixth Directive])?'

27 By decision of the President of the Court of 4 October 2018, Cases C-573/18 and C-574/18 were joined for the purposes of the written procedure and the judgment.

Consideration of the questions referred

The first question

28 In order to answer the first question, it must first be observed that, as can be seen from the information contained in the orders for reference, the disputes in the main proceedings arise from the fact that, in their VAT returns for the financial years concerned, the producer organisations at issue in the main proceedings did not consider the amounts which each of those organisations received as a subsidy from the operational funds as constituting consideration for the supply of goods to producers. In those circumstances, it is sufficient, in order to enable the referring court to resolve those disputes, to determine the taxable amount of the supplies at issue, having regard to the general rule set out in Article 11A(1)(a) of the Sixth Directive.

29 According to that rule, the taxable amount for the supply of goods or the provision of a service is formed by the consideration actually received by the taxable person 'from the purchaser, the customer or a third party … including subsidies directly linked to the price of such supplies'(judgment of 20 January 2005, *Hotel Scandic Gåsabäck*, C-412/03, EU:C:2005:47, paragraph 28).

30 By providing that the taxable amount for VAT encompasses, in the cases specified by it, subsidies paid to taxable persons, Article 11A(1)(a) of the Sixth Directive is intended to subject the full value of goods or services to VAT and hence to prevent payment of a subsidy entailing a lower return from the tax (judgment of 15 July 2004, *Commission* v *Germany*, C-144/02, EU:C:2004:444, paragraph 26).

31 In accordance with its terms, that provision applies where the subsidy is directly linked to the price of the transaction in question. For that to be the case, the subsidy must first be paid specifically to the subsidised operator to enable it to supply particular goods or services. Only in that case can the subsidy be regarded as consideration for the supply of goods or services and therefore be taxable (judgment of 15 July 2004, *Commission* v *Germany*, C-144/02, EU:C:2004:444, paragraphs 27 and 28).

32 Moreover, it is also necessary to verify that the purchasers of the goods or services benefit from the subsidy granted to the beneficiary. The price payable by the purchaser must be fixed in such a way that it diminishes in proportion to the subsidy granted to the seller or supplier of the goods or services, which therefore constitutes an element in determining the price demanded by the latter. It must also be ascertained whether, objectively, the fact that a subsidy is paid to the seller or supplier allows the latter to sell the goods or supply the services at a price lower than he would have to demand in the absence of subsidy (judgment of 15 July 2004, *Commission* v *Germany*, C-144/02, EU:C:2004:444, paragraph 29 and the case-law cited).

33 The consideration represented by the subsidy must, at the very least, be identifiable (judgment of 15 July 2004, *Commission* v *Germany*, C-144/02, EU:C:2004:444, paragraph 30 and the case-law cited).

34 Accordingly, 'subsidies directly linked to the price' for the purposes of Article 11A(1)(a) of the Sixth Directive include only subsidies which constitute the whole or part of the consideration for a supply of goods or services and which are paid by a third party to the seller or supplier (judgment of 15 July 2004, *Commission* v *Germany*, C-144/02, EU:C:2004:444, paragraph 31 and the case-law cited).

35 It follows that Article 11A(1)(a) of the Sixth Directive is intended to take account of the consideration paid for the supply of goods or services in such a way as to reflect the full value of the supply or the provision of services. To that end, that provision includes in the taxable amount, as consideration, subsidies directly linked to the price of those supplies.

36 In the present case, it appears from the orders for reference that the payments from the operational funds have been made to the producer organisations concerned in the main proceedings for the supply of capital goods and have benefited the producers concerned.

37 The producer organisations concerned in the main proceedings have reduced the price charged to producers in consideration for the supply of those goods by the precise amount of the sums coming from the operational funds. There is thus a direct link between the supply of those goods and the consideration actually received. Those producer organisations, in return for the supply of the same goods, received, first, a payment from the producers and, second, a payment from the operational fund concerned for that supply. The payments from the operational funds are therefore made exclusively for the purpose of supplying those capital goods and therefore constitute payments directly linked to the price.

38 It should also be noted that the payments from the operational funds at issue in the main proceedings constitute 'subsidies' from 'a third party' within the meaning of Article 11A(1)(a) of the Sixth Directive. First, as the referring court has indicated, such funds have legal capacity and, second, the producer organisation concerned may not use the goods of those funds for personal purposes, since those funds are used solely to finance operational programmes approved by the competent national authorities, in accordance with Article 15 of Regulation No 2200/96.

39 Finally, as the German Government maintains, the interpretation of Article 11A(1)(a) of the Sixth Directive, set out in paragraphs 35 to 38 of the present judgment, ensures the preservation of fiscal neutrality. Indeed, if a producer purchased goods for his business directly from a manufacturer, without the intervention of the producer organisation to which he belongs and without payment of the operational fund set up by that producer organisation, that supply would be entirely subject to VAT. In contrast, if the VAT on the purchase of such goods were reduced in proportion to the part financed by that operational fund, a producer who purchases goods through the intermediary of that producer organisation would then be subject to lower taxation than a producer who purchases equivalent goods without intervention from the producer organisation. This would accordingly result in unequal treatment, contrary to the principle of tax neutrality.

40 It follows from all the foregoing considerations that the answer to the first question is that Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that, in circumstances such as those in the main proceedings, in which a 'producer organisation', within the meaning of Article 11 of Regulation No 2200/96, purchases goods from input suppliers, supplies those goods to its partner members and obtains from them a payment not covering the purchase price, the amount that an operational fund, such as provided for in Article 15 of that regulation, pays to that producer organisation for the supply of those goods to producers is incorporated in the consideration for that supply and must be regarded as a subsidy directly linked to the price of that supply, paid for by a third party.

The second and third questions

41 In the light of the answer to the first question, there is no need to answer the second and third questions.

Costs

42 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 (Tenth Chamber) hereby rules:

Article 11A(1)(a) 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 must be interpreted as meaning that, in circumstances such as those in the main proceedings, in which a 'producer organisation', within the meaning of Article 11 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruits and vegetables, purchases goods from input suppliers, supplies those goods to its partner members and obtains from them a payment not covering the purchase price, the amount that an operational fund, such as provided for in Article 15 of that regulation, pays to that producer organisation for the supply of those goods to producers is incorporated in the consideration for that supply and must be regarded as a subsidy directly linked to the price of that supply, paid for by a third party.

[Signatures]