

JUDGMENT OF THE COURT (Third Chamber)

16 October 2014 (*)

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Article 44 — Concept of ‘fixed establishment’ of the recipient of a supply of services — Place where services are deemed to be supplied to taxable persons — Intra-Community transaction)

In Case C-605/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 25 October 2012, received at the Court on 24 December 2012, in the proceedings

Welmory sp. z o.o.

v

Dyrektor Izby Skarbowej w Gdańsku,

THE COURT (Third Chamber),

composed of M. Ilešić, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas and C.G. Fernlund (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 March 2014,

after considering the observations submitted on behalf of:

- Welmory sp. z o.o., by M. Gorazda, adwokat,
- the Dyrektor Izby Skarbowej w Gdańsku, by T. Tratkiewicz and J. Kaute, acting as Agents,
- the Polish Government, by B. Majczyna and A. Kramarczyk, acting as Agents,
- the Cypriot Government, by K. Kleanthous and E. Symeonidou, acting as Agents,
- the United Kingdom Government, by L. Christie, acting as Agent, and O. Thomas, Barrister,
- the European Commission, by K. Herrmann, L. Lozano Palacios and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2014,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11) ('the VAT Directive').
- 2 The request has been made in proceedings between *Welmory sp. z o.o.*, which is established in Poland, ('the Polish company') and the *Dyrektor Izby Skarbowej v Gdańsk* (Director of the Gdańsk Tax Chamber, 'the Dyrektor') concerning the place of taxation for value added tax (VAT) of services supplied by that company to a company which has established its place of business in another Member State.

Legal context

EU law

- 3 In accordance with Articles 411 and 413 of the VAT Directive, it repealed and replaced with effect from 1 January 2007 the EU legislation on VAT, in particular the Sixth Council Directive 77/388/EEC of 17 May 1977 on the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'). Article 9(1) of the Sixth Directive, 'Supply of services', read as follows:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'
- 4 Until 31 December 2009, Article 43 of Directive 2006/112, which was in Chapter 3 of that directive, 'Place of supply of services', provided:

'The place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied, or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'
- 5 Directive 2008/8 replaced, with effect from 1 January 2010, Articles 43 to 59 in Chapter 3 of Directive 2006/112.
- 6 Article 44 of the VAT Directive provides:

'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.'
- 7 Recital 4 in the preamble to Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1, 'the Implementing Regulation'), which applies from 1 July 2011, states:

'The objective of this Regulation is to ensure uniform application of the current VAT system by laying down rules implementing Directive 2006/112/EC, in particular in respect of taxable persons, the supply of goods and services, and the place of taxable transactions. ...'
- 8 Recital 14 in the preamble to the Implementing Regulation states:

'To ensure the uniform application of rules relating to the place of taxable transactions, concepts such as the place where a taxable person has established his business, fixed establishment, permanent address and the place where a person usually resides should be clarified. While taking into account the case law of the Court of Justice [of the European Union], the use of criteria which are as clear and objective as possible should facilitate the practical application of these concepts.'

9 Article 11(1) of the Implementing Regulation provides:

'For the application of Article 44 of [the VAT Directive], a "fixed establishment" shall be any establishment, other than the place of establishment of a business ... characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.'

Polish law

10 The Law on value added tax (Ustawa o podatku od towarów i usług) of 11 March 2004 (Dz. U., No 54, position 535), in the version in force from 1 January 2010 to 30 June 2011, ('the Law on VAT') applies to the main proceedings.

11 Article 19(1) and (4) of the Law on VAT provides:

'1. The liability to pay the tax shall arise when the goods or services are supplied, subject to paragraphs 2 to 21, and to Article 14(6), Article 20 and Article 21(1).

...

4. Where the supply of goods or services must be confirmed by an invoice, the liability to pay the tax shall arise when the invoice is issued, but no later than seven days from the date on which the goods or services are supplied.'

12 In accordance with Article 28b(1) and (2) of the Law on VAT:

'1. In the case of services supplied to a taxable person, the place where those services are supplied is the place where the taxable person who receives the services has established his business or has his permanent address, subject to paragraphs (2) to (4) and Articles 28e, 28f(1), 28g(1), 28i, 28j and 28n.

2. Where services are supplied to a taxable person's fixed establishment which is in a place other than the place where he has established his business or has his permanent address, the place of supply of those services is the place where the fixed establishment is located.'

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

13 Welmory Ltd, established in Nicosia (Cyprus), ('the Cypriot company') organises sales by auction on an online sales platform. For that purpose it sells packets of 'bids', that is, the right to make an offer to purchase goods being auctioned at a higher price than the price last offered.

14 According to the documents before the Court, the Cypriot company concluded a cooperation agreement with the Polish company on 2 April 2009, under which it agreed to provide the Polish company with the service of making available an internet auction site with the domain name www.za10groszy.pl, including also the supply of associated services relating to the leasing of the servers needed for the site to function and the display of the

goods to be auctioned. The Polish company for its part undertook principally to sell goods on that site.

- 15 The selling procedure is as follows. The customer first purchases a number of 'bids' from the Cypriot company on the online sales site. Those 'bids' then give the customer the right to take part in the sale of the goods offered for auction by the Polish company on that site and to make an offer to purchase one of the items. Unlike in the classic auction system, in order to make a bid the customer must not only undertake to pay a higher price than that last offered, but must 'pay' for 'bids' for that purpose. Finally, the goods are sold to the customer who by means of his 'bids' has offered the highest price for them.
- 16 The documents before the Court also show that the source of the Polish company's income is, first, the selling price obtained in the online auctions and, secondly, the remuneration received from the Cypriot company corresponding to part of the proceeds of sale of the 'bids' used by the customers in Poland to bid in the auction.
- 17 On 19 April 2010 the Cypriot company acquired 100% of the share capital of the Polish company.
- 18 For the period from January to April 2010, before that acquisition, the Polish company issued four invoices for services supplied to the Cypriot company (advertising, servicing, provision of information and data processing).
- 19 Since it took the view that those services had been supplied at the place of establishment of the Cypriot company and should accordingly be subject to VAT in Cyprus, the Polish company, while indicating that VAT was payable by the recipient of the services, did not invoice VAT.
- 20 However, the Dyrektor considered that these were supplies of services to a fixed establishment of the Cypriot company in Polish territory and that they should consequently be taxed in Poland at the standard rate of 22% in accordance with Article 28b(2) of the Law on VAT.
- 21 The Polish company brought an action for annulment of the Dyrektor's decision before the Wojewódzki Sąd Administracyjny w Gdańsku (Regional Administrative Court, Gdańsk), arguing that an independent operator conducting an independent activity as a taxable person for VAT purposes cannot constitute a fixed establishment of another taxable person.
- 22 The Wojewódzki Sąd Administracyjny w Gdańsku dismissed the action, having regard in particular to the specific nature of the services supplied by the Cypriot company in Polish territory. It considered that the company did not have to have permanent human and material resources in the traditional sense, or make direct use of buildings located within Polish territory, or employ staff there, in order to be regarded as having a fixed establishment there.
- 23 The Wojewódzki Sąd Administracyjny w Gdańsku took the view that the two companies' activities formed an economically indivisible whole, as the object of their entire business could be achieved in Poland only through cooperation between them.
- 24 In support of its decision, the Wojewódzki Sąd Administracyjny w Gdańsku considered that the Cypriot company was making use in Polish territory of the Polish company's technical and human resources, so that the Polish company was to be treated as a fixed establishment of the Cypriot company in Poland. Consequently, it considered that the services supplied by the Polish company to the Cypriot company had been supplied to the latter's fixed establishment in Poland, and were therefore taxable in Poland.

- 25 The Polish company appealed on a point of law against the judgment of the Wojewódzki S d Administracyjny w Gdańsku to the Naczelny S d Administracyjny (Supreme Administrative Court).
- 26 In view of the specific features of the case before it, the Naczelny S d Administracyjny is uncertain whether Article 44 of the VAT Directive may be interpreted as meaning that the place of taxation of supplies of services is located in Poland where the services are supplied by a Polish company to another company established in Cyprus, the two companies being independent of each other in terms of capital and the Cypriot company conducting its economic activity by making use of the infrastructure of the Polish company.
- 27 The Naczelny S d Administracyjny observes that the Court's case-law on the concept of fixed establishment relates to factual and legal situations that differ from the situation at issue in the case before it.
- 28 It states that the case before it concerns a situation in which, at the material time, the two companies were independent of each other. Moreover, the Court's case-law relates to a situation in which the place of the fixed establishment is defined in relation to the supplier of services, and furthermore concerns the situation in which the fixed establishment is defined in relation to supplies of services to a third party, namely the final consumer.
- 29 In those circumstances, the Naczelny S d Administracyjny decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'For the purposes of the taxation of services supplied by [the Polish company], which is established in Poland, to [the Cypriot company], which is established in another Member State of the European Union, in circumstances where [the Cypriot company] carries out its economic activity by making use of [the Polish company's] infrastructure, is the fixed establishment within the meaning of Article 44 of [the VAT Directive] situated in the place in which [the Polish company] is established?'

Consideration of the question referred

Preliminary observations

- 30 Several of the parties to the proceedings have submitted that the question that arises in the main proceedings is not whether the supplies of services by the Polish company to the Cypriot company are supplies of services to the Cypriot company's fixed establishment in Poland, but in which country, Poland or Cyprus, the 'bids' sold by the Cypriot company to customers in Poland must be subject to VAT.
- 31 The Polish Government claims, moreover, that the taxable amount of the goods sold by auction by the Polish company on the Cypriot company's online sales site may not have been correctly assessed. The government raises the question whether, in accordance with Article 73 of the VAT Directive, the taxable amount which the Polish company was required to declare ought not to consist of, first, the price of the goods sold at auction and, secondly, the remuneration obtained from the Cypriot company corresponding to part of the proceeds of sale of the 'bids' used by the customers in Poland in the auctions.
- 32 It must, however, be pointed out that the subject-matter of the question referred for a preliminary ruling relates essentially to the place of taxation of services supplied by the Polish company to the Cypriot company, and hence the interpretation of Article 44 of the VAT Directive, not to the place of taxation of the 'bids' or the determination of the taxable amount of the goods sold by auction by the Polish company.
- 33 In accordance with settled case-law of the Court, in the context of the cooperation between the Court and the national courts provided for by Article 267 TFEU, it is solely for the

national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties to the main proceedings may not change their tenor (see, *inter alia*, judgment in *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraph 32 and the case-law cited).

- 34 In addition, to alter the substance of the questions referred for a preliminary ruling, or to answer additional questions mentioned by the parties, would be incompatible with the Court's duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind the fact that, under that provision, only the decision of the referring court is notified to the interested parties (see, to that effect, judgment in *Danske Svineproducenter*, EU:C:2011:863, paragraph 33 and the case-law cited).
- 35 Consequently, in the present case, an answer should be given solely to the question put by the referring court relating to the determination of the place of taxation of the services supplied by the Polish company to the Cypriot company.

The Court's reply

- 36 By its question, the referring court is essentially asking in what circumstances a first taxable person who has established his business in one Member State, and receives services supplied by a second taxable person established in another Member State, must be regarded as having a 'fixed establishment' within the meaning of Article 44 of the VAT Directive in that other Member State, for the purpose of determining the place of taxation of those services.
- 37 The VAT Directive, in common with the Sixth Directive which it replaced, contains a Title V dealing with the place of taxable transactions. Chapter 3 of that title relates to the place of supply of services, and sections 2 and 3 of that chapter set out respectively the general rules for determining the place of taxation of those supplies and particular provisions relating to specific supplies of services.
- 38 Like Article 9 of the Sixth Directive, Articles 44 to 59b of the VAT Directive contain rules which determine the point of reference for tax purposes. Thus, while Article 9(1) of the Sixth Directive laid down general rules in that regard, such rules are also laid down by Articles 44 and 45 of the VAT Directive. Similarly, Articles 46 to 59b of the VAT Directive, like Article 9 (2) and (3) of the Sixth Directive, set out a number of specific places of reference.
- 39 However, the main proceedings relate to the interpretation of Article 44 of the VAT Directive, which states that the place of supply of services to a taxable person is no longer determined by reference to the taxable person supplying the services but by reference to the taxable person receiving them.
- 40 The question therefore arises whether the Court's case-law on the interpretation of Article 9(1) of the Sixth Directive is still relevant, having regard to the changes made by Article 44 of the VAT Directive.
- 41 It should be recalled that, when interpreting a provision of EU law, it is necessary to consider not only the wording of the provision but also the context in which it occurs and the objective pursued by the rules of which it forms part (judgment in *ADV Allround*, C-218/10, EU:C:2012:35, paragraph 26 and the case-law cited).

- 42 In accordance with settled case-law of the Court, the object of the provisions determining the point of reference for tax purposes of supplies of services is to avoid, first, conflicts of jurisdiction which may result in double taxation and, secondly, non-taxation (see, to that effect, judgment in *ADV Allround*, EU:C:2012:35, paragraph 27 and the case-law cited).
- 43 The wording of Article 44 of the VAT Directive is similar to that of Article 9(1) of the Sixth Directive. Furthermore, both Article 44 of the VAT Directive and Article 9(1) of the Sixth Directive are provisions determining the point of reference for tax purposes of supplies of services and pursue the same objective, so that the Court's case-law on the interpretation of Article 9(1) of the Sixth Directive can in principle be applied *mutatis mutandis* to the interpretation of Article 44 of the VAT Directive.
- 44 That conclusion is borne out by the Implementing Regulation, the objective of which, as stated in recital 4 in its preamble, is to ensure a more uniform application of the VAT system by laying down rules implementing the VAT Directive, in particular in respect of taxable persons, the supply of goods and services, and the place of taxable transactions.
- 45 It is apparent from recital 14 in the preamble to that regulation that the EU legislature wished to clarify certain concepts necessary for determining criteria relating to the place of taxable transactions, while taking account of the relevant case-law of the Court.
- 46 To that extent, even though that regulation was not yet in force at the material time, it should none the less be taken into account.
- 47 It follows that, for answering the question put by the referring court, the Court's case-law on Article 9(1) of the Sixth Directive and the Implementing Regulation are of relevance.
- 48 The question that arises in the context of the main proceedings is that of defining the place of supply of services supplied by the Polish company to the Cypriot company, and more particularly of defining the criteria for establishing whether the Cypriot company has a fixed establishment in Poland.
- 49 Article 44 of the VAT Directive states that the place of supply of services to a taxable person acting as such is 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 is the place where that fixed establishment is located. In the absence of such a place of establishment or fixed establishment, the place of supply of services is the place where the taxable person who receives such services has his permanent address or usually resides.
- 50 In this connection, it must be recalled, as is apparent from paragraph 42 above, that a provision such as 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.
- 51 For that purpose, that provision aims to create a rational delimitation of the respective areas covered by national rules on VAT by determining in a uniform manner the point of reference for tax purposes of supplies of services.
- 52 It is necessary, therefore, first to determine the primary point of reference in order to establish the place of supply of services, and then to define the criteria which must be satisfied for a taxable person receiving services, such as that at issue in the main proceedings, with its place of business in one Member State, to be regarded as having a fixed establishment in a Member State other than that in which it has established its business.

The primary point of reference

- 53 According to the settled case-law of the Court on Article 9 of the Sixth Directive, the most appropriate, and thus the primary, point of reference for determining the place of supply of services for tax purposes is the place where the taxable person has established his business. It is only if that place of business does not lead to a rational result or creates a conflict with another Member State that another establishment may come into consideration (see, *inter alia*, judgments in *Berkholz*, 168/84, EU:C:1985:299, paragraph 17; *Faaborg-Gelting Linien*, C-231/94, EU:C:1996:184, paragraph 16; and *ARO Lease*, C-190/95, EU:C:1997:374, paragraph 15).
- 54 That interpretation is also valid in relation to Article 44 of the VAT Directive.
- 55 As was the case under the Sixth Directive, the place where the taxable person has established his business as primary point of reference appears to be a criterion that is objective, simple and practical and offers great legal certainty, being easier to verify than, for example, the existence of a fixed establishment. Moreover, the presumption that the services are supplied at the place where the taxable person receiving them has established his business makes it possible both for the competent authorities of the Member States and for suppliers of services to avoid having to undertake complex investigations in order to determine the point of reference for tax purposes.
- 56 Furthermore, the place of business is mentioned in the first sentence of Article 44 of the VAT Directive, whereas the fixed establishment is mentioned only in the following sentence. That sentence, introduced by the adverb 'however', can only be understood as creating an exception to the general rule set out in the previous sentence.

The concept of fixed establishment

- 57 It should be recalled that, as is apparent from paragraph 39 above, in the context of Article 44 of the VAT Directive, the place of supply of services is no longer determined by reference to the taxable person supplying the services but by reference to the taxable person receiving them. The concept of fixed establishment must therefore be determined in relation to the taxable person receiving the services.
- 58 It may be deduced from the Court's case-law on the point (see, in particular, judgment in *Planzer Luxembourg*, C-73/06, EU:C:2007:397, paragraph 54 and the case-law cited), which directly inspired the wording of Article 11 of the Implementing Regulation, that a fixed establishment must be characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.
- 59 So, to be considered, in circumstances such as those of the main proceedings, as having a fixed establishment within the meaning of Article 44 of the VAT Directive, the Cypriot company must have in Poland at the very least a structure characterised by a sufficient degree of permanence, suitable in terms of human and technical resources to enable it to receive in Poland the services supplied to it by the Polish company and to use them for its business, namely running the electronic auction system in question and issuing and selling 'bids'.
- 60 The fact that a business such as that carried on by the Cypriot company at issue in the main proceedings, consisting in operating a system of electronic auctions which comprises, first, making an auction website available to the Polish company and, secondly, issuing and selling 'bids' to customers in Poland, can be carried on without requiring an effective human and material structure in Polish territory is not determinative. Despite its particular character, such a business requires at least a structure that is appropriate in terms especially of human and technical resources, such as appropriate computer equipment, servers and software.

- 61 In its written observations and at the hearing the Polish company argued that the infrastructure it makes available to the Cypriot company does not enable the Cypriot company to receive and use for its business the services supplied to it by the Polish company. According to the Polish company, the human and technical resources for the business carried on by the Cypriot company, such as computer servers, software, servicing and the system for concluding contracts with consumers and receiving income from them, are situated outside Polish territory. It claims that those factual circumstances were not verified in the main proceedings.
- 62 However, the national court has exclusive jurisdiction to verify such factors in order to assess whether the Cypriot company has the necessary human and technical resources in Poland for it to be able to receive services supplied by the Polish company and to use them for the operation and maintenance of the auction sales website and the issuing and selling of 'bids'.
- 63 If the facts alleged by the Polish company were shown to be correct, the referring court would then be led to conclude that the Cypriot company does not have a fixed establishment in Poland, since it does not have the necessary infrastructure to enable it to receive services supplied by the Polish company and to use them for its business.
- 64 The fact that the economic activities of the two companies, which are linked by a cooperation agreement, form an economic whole and that their results are of benefit essentially to consumers in Poland is not material for determining whether the Cypriot company possesses a fixed establishment in Poland. As has been rightly pointed out by the Polish company, the Cypriot Government and the European Commission, the services supplied by the Polish company to the Cypriot company must be distinguished from those supplied by the Cypriot company to consumers in Poland. They are distinct supplies of services which are subject to different schemes of VAT.
- 65 Having regard to all the foregoing, the answer to the question referred for a preliminary ruling is that a first taxable person who has established his business in one Member State, and receives services supplied by a second taxable person established in another Member State, must be regarded as having a 'fixed establishment' within the meaning of Article 44 of the VAT Directive in that other Member State, for the purpose of determining the place of taxation of those services, if that establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business, which is for the referring court to ascertain.

Costs

- 66 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 (Third Chamber) hereby rules:

A first taxable person who has established his business in one Member State, and receives services supplied by a second taxable person established in another Member State, must be regarded as having a 'fixed establishment' within the meaning of 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, in

that other Member State, for the purpose of determining the place of taxation of those services, if that establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business, which is for the referring court to ascertain.

[Signatures]

» Language of the case: Polish.