Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 8 May 2014 [1]

Case C-7/13

Skandia America Corp. (USA), filial Sverige
v
Skatteverket
(Request for a preliminary ruling

made by the förvaltningsrätten i Stockholm (Sweden))

(Common system of value added tax — VAT group — Internal invoicing for services supplied by a main company with its seat in a third country to its branch belonging to a VAT group within a Member State — Whether or not services supplied are taxable)

I – **Introduction**

1. This request for a preliminary ruling has been made in the context of proceedings between the Swedish branch of Skandia America Corporation, established in the United States, and the Skatteverket (Swedish tax authority) relating to the Skatteverket's decision to charge value added tax ('VAT') on the supply of services by Skandia America Corporation to its Swedish branch, registered in Sweden as a member of a group composed of several companies considered as a single taxable person for VAT ('the VAT group').

2. In *FCE Bank*, the Court stated that a fixed establishment, which is not a legal entity distinct from the company of which it forms part, established in another Member State from that company and to which the company supplies services, should not be treated as a taxable person for VAT by reason of the costs imputed to it in respect of those supplies. [2]

3. This case concerns the interpretation of Articles 9(1), 11 and 196 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') [3] and essentially raises the question whether the principle set out by the Court in *FCE Bank* (EU:C:2006:196) applies where the branch is part of a VAT group in the country where it is established and, if so, whether it is the supplier or purchaser of the services in question who is liable for the tax.

1 — Original language: French.

2 — C-210/04, EU:C:2006:196, paragraph 41.

3 — OJ 2006 L 347, p. 1.

II – **Legal framework**

A – *European Union law*

4. Article 2 of the VAT Directive provides as follows:

‘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;

…’

5. The first subparagraph of Article 9(1) of the VAT Directive provides as follows:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.’

6. According to Article 11 of the VAT Directive:

‘After consulting the advisory committee on value added tax (hereafter, the “VAT Committee”), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

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

7. Article 43 of the VAT Directive provides as follows:

‘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.’

8. Article 56(1)(c) and (k) of the VAT Directive provides as follows:

‘1. The place of supply of the following services to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides:

(c) the services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the provision of information;

…

(k) electronically supplied services, such as those referred to in Annex II;

…’

9. Article 193 of the VAT Directive states:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202.'

10. According to Article 196 of the VAT Directive:

'VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied or by any person identified for VAT purposes in the Member State in which the tax is due to whom the services referred to in Articles 44, 47, 50, 53, 54 and 55 are supplied, if the services are supplied by a taxable person not established in that Member State.'

11. Annex II, entitled 'Indicative list of the electronically supplied services referred to in point (k) of Article 56(1)', is worded as follows:

'(1) Website supply, web-hosting, distance maintenance of programmes and equipment;

(2) supply of software and updating thereof;

(3) supply of images, text and information and making available of databases;

(4) supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events;

(5) supply of distance teaching.'

B – *Swedish law*

12. Chapter 6a, Articles 1 to 4, of Law No 200 of 1994 on Value Added Tax (mervärdesskattelagen (1994:200)) provides that two or more economic operators may be deemed to be a single economic operator (a VAT group) and the activity in which they are engaged may be considered to be a single activity. A fixed establishment of an economic operator may belong to a VAT group only if it is situated in Sweden. A VAT group may consist only of economic operators which are closely bound to one another by financial, economic and organisational links. A VAT group is created on the basis of a decision to register by the Skatteverket following an application by the members of the group. These provisions were adopted on the basis of the authority conferred by Article 11 of the VAT Directive.

13. Chapter 5, Article 7, first paragraph, of that law provides that the services listed in the second paragraph are supplied within Sweden if they are supplied from a country outside the European Union and the purchaser is an economic operator which has the seat of its economic activity in Sweden. These services include consultancy services and similar services and electronically supplied services for the distance maintenance of programmes and the supply and updating of software. This provision is intended to transpose Article 56 of the VAT Directive.

14. Under Chapter 1, Article 2, first paragraph, subparagraph 1, of that law, anyone carrying out a supply of services within the meaning of Article 1 of that Chapter is liable to pay the VAT on the transaction. It follows from subparagraph 2 of the first paragraph of Article 2 that a purchaser of the services covered by Chapter 5, Article 7, from a foreign undertaking is liable to pay the VAT on the purchase. These provisions are intended to transpose Articles 193 and 196 of the VAT Directive.

15. Under Chapter 1, Article 15, of that law, 'foreign undertaking' means an economic operator which does not have the seat of its economic activity or a fixed establishment in Sweden and is not permanently resident or habitually resident in Sweden.

III – **Main proceedings and questions referred**

16. Skandia America Corporation is a company incorporated under the law of Delaware (USA) and has the seat of its economic activity in the United States. It is part of the Old Mutual insurance group of which the parent company, Old Mutual plc, is established in the United Kingdom. For the 2007 and 2008 financial years, Skandia America Corporation was the group's global purchasing company for IT services. It distributed these externally-purchased IT services to various companies and branches in the group, including its Swedish branch.

17. The Swedish branch has been registered as a member of the VAT group of the Försäkringsaktiebolaget Skandia (publ) insurance company since 11 July 2007. It was tasked with processing the IT services supplied by Skandia America Corporation into the final product, called IT Production (IT-produktion). That production was then supplied to various group companies, both within and outside the VAT group. A mark-up of five per cent was charged on each supply of services, both between Skandia America Corporation and its Swedish branch, and between the branch and the other group companies. Costs were allocated between Skandia America Corporation and its Swedish branch by the issue of internal invoices.

18. The Skatteverket took the view that the supplies of services by Skandia America Corporation to its Swedish branch constituted taxable transactions and were therefore subject to VAT, for which Skandia America Corporation was liable. For that purpose, the Skatteverket registered the Swedish branch as a taxable person for VAT and charged the amount of the tax to the branch, on the ground that it constituted the fixed establishment of Skandia America Corporation in Sweden.

19. The Swedish branch of Skandia America Corporation lodged an action for annulment against this decision with the referring court, submitting that there was no legal basis for taxing a transaction between a main establishment and its branch or for registering the branch for VAT alongside its existing registration as a member of the VAT group.

20. Taking the view that the VAT questions raised in the main proceedings had not previously been decided by the Court of Justice, the referring court stayed proceedings and submitted the following questions to the Court for a preliminary ruling:

'(1) Do supplies of externally purchased services from a company's main establishment in a third country to its branch in a Member State, with an allocation of costs for the purchase to the branch, constitute taxable transactions if the branch belongs to a VAT group in the Member State?

(2) If the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within the meaning of Article 196 of Directive 2006/112/EC on the common system of value added tax, with the result that the purchaser is to be taxed for the transactions?'

IV – **Procedure before the Court of Justice**

21. The request for a preliminary ruling was lodged at the Court on 7 January 2013. Skandia America Corporation, the Skatteverket, the German and United Kingdom Governments and the European Commission lodged written observations.

22. On 21 January 2014, the Court addressed the following question to the parties for a reply at the hearing:

'Pursuant to Article 61(1) of the Rules of Procedure of the Court of Justice, the parties are invited to submit their opinions on whether, in view of *FCE Bank* (EU:C:2006:196), the branch of a company from a third country incorporated in a Member State may constitute a "person established in the territory of that Member State" within the meaning of Article 11 of the VAT Directive.'

23. At the hearing on 12 March 2014, Skandia America Corporation, the Swedish, German and United Kingdom Governments and the Commission presented oral argument.

V – **Analysis**

A – *First question referred*

24. In its first question, the referring court wishes to know whether supplies of externally purchased services from a company's main establishment in a third country to its branch in a Member State, with an allocation of costs for the purchase to the branch, constitute transactions on which VAT is charged if the branch belongs to a VAT group in the Member State.

25. In other words, this question concerns the applicability of the principle laid down by the Court in *FCE Bank* (EU:C:2006:196) when a branch of a company incorporated in a third country belongs to a VAT group in the Member State where it is incorporated. In that case, the Court had held that 'a fixed establishment, which is not a legal entity distinct from the company of which it forms part, established in another Member State and to which the company supplies services, should not be treated as a taxable person by reason of the costs imputed to it in respect of those supplies'.[4]

1. The views of the parties

26. Skandia America Corporation and the German Government consider that a branch may belong to a VAT group independently of the main establishment. The German Government claims, in particular, that in referring to 'persons established in the territory [of the Member State of the group]', Article 11 of the VAT Directive applies to fixed establishments of foreign taxable persons who are located within the territory of the Member State.

27. Skandia America Corporation and the German Government also submit that the principle of unity between a main establishment and a branch, set out in *FCE Bank* (EU:C:2006:196), is equally applicable when the branch belongs to a VAT group. According to them, Article 11 of the VAT Directive does not give a Member State the right to artificially split a main establishment and its branch into two taxable persons.

28. In this regard, Skandia America Corporation considers that its Swedish branch does not have sufficient autonomy to act on its own account and under its own responsibility or to assume by itself the economic risks of its operations in such a way that there would be a turnover for VAT purposes between the branch and the main establishment. For the reasons set out at paragraphs 36 to 40 of *FCE Bank* (EU:C:2006:196) and, in particular, the fact that the branch does not bear the economic risks arising from its business activities and does not have any endowment capital, Skandia America Corporation submits that its branch cannot be regarded as a taxable person by reason of the costs imputed to it in respect of processing the externally-purchased IT services.

4 — *FCE Bank* (EU:C:2006:196, paragraph 41).

29. The German Government submits that the principle of business unity applies only to the establishments of one single legal entity and, in the context of taxation of VAT groups, only to those members of a group that have their seat in the Member State of the group. It follows, according to the German Government, that internal supplies between different legal entities within a VAT group are not subject to VAT in so far as they are limited to transactions involving establishments (including main establishments) located within the Member State of the VAT group. Consequently, such supplies are subject to VAT only when one of the parties involved in the supply is an establishment (including a main establishment) which is not located within the Member State of the VAT group.

30. Meanwhile, the United Kingdom Government considers also that the principle set out by the Court in *FCE Bank* (EU:C:2006:196) is applicable to this case and that the supply of services that took place between the main establishment and the branch is not chargeable to tax.

31. However, contrary to the opinions of Skandia America Corporation and the German Government, the United Kingdom Government submits that a branch cannot itself belong to a VAT group. It bases this view on the wording of Article 11 of the VAT Directive which refers to '*persons established* in the territory of [the] Member State [where the VAT group is constituted] who [are] *legally independent*'.[5]

32. The United Kingdom Government submits that the term 'persons established' must mean the whole of a legal entity of which the branch in question forms part and concludes that, in this case, 'person' must be Skandia America Corporation which is established in Sweden through its branch, rather than the branch itself.

33. The Skatteverket, the Swedish Government and the Commission disagree with these interpretations of Articles 9 and 11 of the VAT Directive. Although they do not dispute the principle set out in *FCE Bank* (EU:C:2006:196), the Skatteverket, the Swedish Government and the Commission consider that this principle does not apply when only the branch is registered in a VAT group. For their part, they consider that the consequence of the branch being included in a VAT group is that, in accordance with the principle of a single taxable person contained in Article 11 of the VAT Directive, the branch can no longer form part of the same taxable person as the main establishment.

34. In support of their view, the Skatteverket, the Swedish Government and the Commission cite *Ampliscientifica and Amplifin*, in which the Court held that 'the effect of implementing the scheme established in [Article 11 of the VAT Directive] is that national legislation adopted on the basis of that provision allows persons, in particular companies, which are bound to one another by financial, economic and organisational links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as *a single taxable person*'.[6]

35. The Skatteverket, the Swedish Government and the Commission rely on the principle of a single taxable person, arguing that the effect for VAT purposes of including the branch in a VAT group is that there will be a supply of services between two taxable persons, namely the main establishment, being Skandia America Corporation, and the VAT group, including its branch.

36. In relation to whether a branch of a company can be included in a VAT group without the main establishment being included, the Commission considers that the wording 'persons established in the territory of that Member State' in Article 11 of the VAT Directive must be interpreted in the way indicated in its Communication to the Council and the European Parliament on the VAT group option provided for in Article 11 of Directive 2006/112 on the common system of value added tax ('the Communication').[7]

5 — My emphasis.

6 — *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 19). My emphasis.

7 — COM(2009) 325 final, point 3.3.2.

37. According to that communication, this wording means that it is not possible to include in a VAT group branches established abroad but forming part of legal entities established in the Member State implementing the VAT group. *A contrario*, it is possible to include in a VAT group branches established in the territory of the Member State implementing the VAT group where they form part of legal entities established abroad.

38. The Skatteverket, the Swedish Government and the Commission therefore consider that the inclusion of the Swedish branch in question in the VAT group does not call into question the principle set out in *FCE Bank* (EU:C:2006:196).

2. Assessment

39. I will begin my assessment by considering the wording of Article 11 of the VAT Directive, which states that 'each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links'.

40. As implied in the question posed by the Court for the parties to respond to at the hearing, it is necessary firstly to determine whether a branch can of its own right belong to a VAT group in the Member State where it is established, that is to say, without there also being included the company of which it forms part where that company is not established within the same Member State. In other words, it is necessary to determine whether the Swedish branch of Skandia America Corporation qualifies as a 'person' established within Sweden within the meaning of Article 11 of the VAT Directive.

41. This term has already been analysed by the Court in *Commission* v *Ireland*,[8] even though that analysis revolved specifically around whether the term 'person' as used in Article 11 of the VAT Directive meant a 'taxable person' within the meaning of Article 9 of that directive.

42. Contrary to the submissions of the Swedish and German Governments at the hearing, according to which non taxable persons may be included in a VAT group,[9] the Court did not allow the inclusion of branches in a VAT group separately from their main establishment.

43. The fact that in *Commission* v *Ireland* (EU:C:2013:217) the Court held that 'person' does not mean 'taxable person' simply implies that several persons who are not themselves taxable persons can, by creating a VAT group, form a 'single taxable person' for the purposes of Article 9 of the VAT Directive, that is to say, one carrying out 'independently … in any place any economic activity, whatever the purpose or results of that activity'. In *Commission* v *Ireland*, the Court therefore did not define the term 'person' used in Article 11 of the VAT Directive.

44. I would emphasise the difference in the terminology used in Articles 9 and 11 [of the French version] of the VAT Directive. Article 9 applies to '*any person (quiconque)* who … carries out … any economic activity',[10] while Article 11 applies to '*any persons (personnes)* established in the territory of [the] Member State [where the VAT group is constituted] who, while legally independent, are closely bound to one another by financial, economic and organisational links'.[11]

8 — *Commission* v *Ireland* (C-85/11, EU:C:2013:217). See also *Commission* v *Sweden* (C-480/10, EU:C:2013:263); *Commission* v *Netherlands* (C-65/11, EU:C:2013:265); *Commission* v *Finland* (C-74/11, EU:C:2013:266); *Commission* v *United Kingdom* (C-86/11, EU:C:2013:267); and *Commission* v *Czech Republic* (C-109/11, EU:C: 2013:269).

9 — *Commission* v *Ireland* (EU:C:2013:217, paragraph 50).

10 — My emphasis.

11 — My emphasis.

45. In my opinion, this difference demonstrates that the scope *ratione personae* of Article 11 is narrower than that of Article 9. The term 'personne' can only be understood in its ordinary sense, that is, a 'being with legal personality',[12] namely a natural or legal person, which is certainly more restrictive than 'quiconque'. This difference is illustrated in *Heerma*, where the Court held that the concept of taxable person covered not only natural and legal persons but also entities without a legal personality such as a partnership governed by Netherlands law.[13] I do not believe that that interpretation would have been possible had Article 9 also referred to a 'personne'.

46. Consequently, as the United Kingdom Government submits, in order for an entity to belong to a VAT group, it must be a distinct 'personne', which is not the case with a branch.

47. Moreover, a main establishment and its branch united as a single legal person cannot both be individual taxable persons for VAT.

48. As Advocate General Léger pointed out in point 56 of his Opinion in *FCE Bank* (C-210/04, EU:C:2005:582), 'subject to consultation with the VAT committee provided for in Article [11 of the VAT Directive], each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links. As the United Kingdom Government notes, that provision can be read, *a contrario*, as meaning that the same legal entity can constitute one and only one taxable person.'

49. The conclusion that a branch may not belong to a VAT group in its own right unless the company of which it forms part also belongs to the same VAT group is completely in keeping with *FCE Bank* (EU:C:2006:196), a fact not disputed by any of the parties. In that judgment, the Court held that 'a provision of services is taxable only if there exists between the service provider and the recipient a legal relationship in which there is a reciprocal performance'.[14] The Court held that the branch did not carry out an independent economic activity as it did not bear the economic risk arising from the business of the entity of which it formed part.[15] The Court therefore concluded that a branch which is not a legal entity distinct from the company to which it belongs cannot be considered to be a taxable person independent of that company.[16]

50. In addition, the Skatteverket, the Swedish Government and the Commission suggest that it is not possible to apply *FCE Bank* (EU:C:2006:196) in a situation where the branch belongs to a VAT group since, in belonging to the group, it ceases to form part of the taxable person of the company and becomes part of a different taxable person, namely the VAT group.

51. The Commission relies heavily on its communication in which it stated that Article 11 should be interpreted in accordance with the principles of territoriality and fiscal sovereignty,[17] according to which the fiscal power of each Member State may not exceed the limits of its territory. Accordingly, the Commission claims that only businesses with their seat of economic activity or fixed establishments of such businesses or of foreign businesses situated in the territory of the Member State that has implemented the VAT grouping scheme may belong to a VAT group.

12 — Cornu, G., *Vocabulaire juridique*, 9th ed, PUF, Paris, 2011, p. 752.

13 — C-23/98, EU:C:2000:46.

14 — *FCE Bank* (EU:C:2006:196, paragraph 34).

15 — Ibid. (paragraphs 35 to 41).

16 — Ibid. (paragraph 41).

17 — COM(2009) 325 final, point 3.3.2.1.

52. I consider that the text of the VAT Directive and the case-law of the Court do not permit this approach. The Commission itself says that its position 'may at first glance seem inconsistent with the *FCE Bank* ruling [EU:C:2006:196]'.[18] Contrary to the Commission's analysis, the fact that that judgment makes no reference to the situation of VAT groups does not justify the registration of a branch of its own right in a VAT group.

53. What is more, the Commission's argument that inclusion in a VAT group renders the branch part of another taxable person does not address the previous question of whether a branch may be included of its own right in a VAT group.

54. The fact that the supply of services between the main establishment and the branch is carried out for consideration is of no relevance. As the Court held in *FCE Bank*, 'any agreement on the sharing of costs is also irrelevant for present purposes since such an agreement was not negotiated between independent parties'.[19] Moreover, as Skandia America Corporation acknowledges, that agreement concerned the fixing of prices and sharing of costs as decided internally by the company, which serve to determine the profits of the fixed establishment.[20]

55. What is more, at the hearing, the Swedish and German Governments referred to *Crédit Lyonnais*, at paragraph 33 of the judgment, where the Court held that 'a company which has its principal establishment in one Member State and a fixed establishment in another Member State must be considered, by virtue of that fact, as being established in the last-mentioned Member State for the activities carried out there'.[21]

56. However, even though this passage concerns the repayment of VAT, by deduction or by refund, rather than the formation of a VAT group, it does not in any way permit a branch to belong to a VAT group independently from the main establishment. Rather, it seems to me to support the opposite view to that taken by the Swedish and German Governments, namely the inclusion of the whole company in the VAT group on the basis that, due to the presence of its fixed establishment in the Member State of the VAT group, the company in question is a 'person established in the territory of that Member State' for the purposes of Article 11 of the VAT Directive.

57. Last, but by no means least, Skandia America Corporation's contention that the Swedish branch may of its own right belong to the VAT group would lead to the consequence, when applied together with the principle in *FCE Bank* (EU:C:2006:196), that neither the supplies between the American main establishment and its Swedish branch nor the supplies between that branch and the other members of the VAT group would be liable to tax.

58. Such an outcome, of particular relevance to the insurance sector where there is a VAT exemption provided in Article 135(1)(a) of the VAT Directive and therefore no charge, can only result from the application of two incompatible rules. The branch cannot simultaneously join with the company of which it is part to constitute a sole economic operator for VAT purposes pursuant to *FCE Bank* (EU:C:2006:196) and also be separated from that company for the same VAT purposes by being the only member of a VAT group.

18 — Ibid., point 3.3.2.2.

19 — EU:C:2006:196, paragraph 40. At paragraph 41, the Court pointed out that the branch should not be 'treated as a taxable person *by reason of the costs imputed to it in respect of those supplies*'. My emphasis.

20 — See also, to that effect, points 65 and 66 of the Opinion of Advocate General Léger in *FCE Bank* (EU:C:2005:582).

21 — C-388/11, EU:C:2013:541.

59. I would add that the second paragraph of Article 11 of the VAT Directive also permits Member States to 'adopt any measures needed to prevent tax evasion or avoidance through the use of this provision'. The Court has also, more generally, acknowledged that combating possible tax evasion and abuse is an objective recognised and encouraged by the VAT Directive. [22]

3. Conclusion

60. In the light of the foregoing considerations, I am of the opinion that the decision by the Skatteverket to include the Swedish branch of Skandia America Corporation in the VAT group of the insurance company Försäkringsaktiebolaget Skandia (publ) in its own right is unlawful under Article 11 of the VAT Directive.

61. As to the consequences of this unlawfulness which should be drawn by the referring court, four situations need to be examined, in the order listed below.

4. Consequences of the unlawfulness

(a) The decision to include the branch in the VAT group is set aside

62. In this situation, the branch does not form part of the VAT group. Consequently, the supplies made between Skandia America Corporation as the main establishment and its Swedish branch are not subject to VAT, according to the principle set out in *FCE Bank* (EU:C:2006:196).

63. On the other hand, the supplies of services between the Swedish branch of Skandia America Corporation and the VAT group in question are subject to VAT, which is payable by Skandia America Corporation pursuant to Article 193 of the VAT Directive which provides that 'VAT shall be payable by any taxable person carrying out a taxable supply of … services'. [23]

(b) The decision to include the branch in the VAT group is given a lawful interpretation

64. In this situation, the referring court could interpret the decision to include the branch in the VAT group in such a way as to render it in conformity with Union law, by holding that the request to join the VAT group could only have been made by Skandia America Corporation itself which would therefore be included as a whole in the group.

65. It would be necessary to determine whether a company incorporated under the law of a third country, in this case the United States, but with a fixed establishment in a Member State, in this instance the Kingdom of Sweden, can be included in a VAT group constituted in that Member State.

22 — See in particular, judgments in *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 71); *Kittel* and *Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 54); *R.* (C-285/09, EU:C:2010:742, paragraph 36); *Tanoarch* (C-504/10, EU:C:2011:707, paragraph 50); *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 41); *Bonik* (C-285/11, EU:C:2012:774, paragraph 35); and *Stroy trans* (C-642/11, EU:C:2013:54, paragraph 46).

23 — Article 196 of the VAT Directive which, when read in conjunction with Article 56 of the same directive, imposes an obligation on the purchaser to pay the VAT, is not applicable in this case, since the services in question are not supplied 'to taxable persons established in the [Union] but not in the same country as the supplier'. The VAT group in its capacity of purchaser of the services in question is established in Sweden, as is the supplier of the services in question, namely Skandia America Corporation, through the intermediary of its Swedish branch. Article 43 of the same directive therefore applies, under which '[t]he 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*'. My emphasis.

66. In my opinion, as the United Kingdom Government maintains, the wording of Article 11 of the VAT Directive, which refers to 'any persons established in the territory [of the Member State where the VAT group is constituted]' allows such a company which has a fixed establishment in the territory of a Member State to belong in its entirety to a VAT group constituted in that Member State.

67. This interpretation of the term 'persons established' complies not only with the concept of an establishment for the purposes of EU law but also with Article 2(1)(c) of the VAT Directive, which states that '[t]he following transactions shall be subject to VAT: … the supply of services for consideration [in the French version: '*carried out' (effectuées)*] *within the territory of a Member State* by a taxable person acting as such'.[24] 'The place of supply of services' shall, according to the general rule in Article 43, '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'.[25]

68. In this instance, Skandia America Corporation has a fixed establishment in Sweden from which the supply of services in question is carried out. It is therefore possible to regard Skandia America Corporation as being a person established in Sweden for the purposes of Article 11 of the VAT Directive, despite it being constituted in the United States.

69. In this case, the supplies that took place between Skandia America Corporation as main establishment and its Swedish branch would not have been subject to VAT under the principle in *FCE Bank* (EU:C:2006:196).

70. On the other hand, transactions taking place between the VAT group (including Skandia America Corporation) in its capacity as purchaser and its supplier (which may be established in a Member State other than the Kingdom of Sweden or in a third country) as a service provider not belonging to the Skandia America Corporation group would be chargeable to VAT as they would constitute a 'supply of services for consideration within the territory of a Member State by a taxable person acting as such' for the purposes of Article 2(1)(c) of the VAT Directive.

71. More precisely, there would be a supply of services carried out 'within the territory of a Member State', since Article 56 would apply to this situation given that these are electronically supplied services (Article 56(1)(k)). As an exception to the general rule in Article 43 of the VAT Directive, Article 56(1) provides that '[t]he place of supply of the [relevant] services … to taxable persons established in the [Union] but not in the same country as the supplier, shall be the place where the customer has established his business'. In this case, the services in question would be supplied to the VAT group which is established in Sweden and outside the country of the supplier, which may be established in a third country or in a Member State other than the Kingdom of Sweden.

72. Liability for the VAT would remain to be determined. Article 196 of that directive provides that 'VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied'. Accordingly, VAT would be payable by the VAT group, to whom the services are supplied.

24 — My emphasis.

25 — My emphasis.

(c) Neither Skandia America Corporation nor the branch are part of the VAT group

73. As the Swedish Government stated at the hearing, the inclusion of a person in a VAT group is based on a voluntary application to join and the approval of the Skatteverket. Skandia America Corporation would perhaps not have filed a request to join the VAT group if it had known that the Skatteverket would not permit solely its branch to be included. It therefore seems to me correct that the decision to include the Swedish branch of Skandia America Corporation in the VAT group in question should be interpreted as meaning that Skandia America Corporation became a member of the group in its entirety only if the company so wishes.

74. If that was not the case, the consequences in relation to VAT would be the same in this situation as in the first situation. [26]

(d) The decision of the Skatteverket to make the supply of services from Skandia America Corporation to its Swedish branch liable to VAT is justified by the need to combat tax avoidance (Article 11, second paragraph, of the VAT Directive)

75. That situation has to be entertained if, as Skandia America Corporation maintained at the hearing, for reasons of domestic law the decision to include the Swedish branch of Skandia America Corporation in the VAT group could be neither set aside nor interpreted in the way described in the second and third situations. In that case, the contested decision of the Skatteverket could take as its basis the second paragraph of Article 11 of the VAT Directive, which authorises a Member State which has exercised the option to allow the formation of VAT groups to 'adopt any measures needed to prevent tax evasion or avoidance through the use of this provision'.

76. As I set out in points 57 and 58 above, the consequence of the inclusion of only the Swedish branch of Skandia America Corporation in the VAT group, taken together with the principle in *FCE Bank* (EU:C:2006:196), would be that the supplies between the American main establishment and the Swedish branch would not be liable to VAT, while the supplies between the branch and the other members of the VAT group would not be liable either but this time under Article 11 of the VAT Directive. This would produce a result that was not desired by the EU legislature, namely that the supplies of services in question would not be taxable.

77. In that situation, it would therefore be necessary to impose VAT on the transactions between Skandia America Corporation as main establishment and its Swedish branch, the tax being payable, as the Commission states, by the VAT group as purchaser of the services under Articles 56 and 196 of the VAT Directive. [27]

78. I note that in all four situations, the supplies in question are subject to VAT.

79. The reply to the first question must therefore be that Article 11 of the VAT Directive has to be interpreted as meaning that the branch of a company constituted in compliance with the law of a third country cannot, independently of that company, be registered in a VAT group in the Member State in which it is established. The supplies of services taking place between the main establishment and the branch do not constitute taxable transactions for VAT purposes, unlike the supplies of services taking place between the branch and its customers, whether or not these are members of the VAT group.

26 — See points 62 and 63 above.

27 — For a more detailed analysis, see points 81 to 87 below.

B – *Second question referred*

80. In the alternative, if the Court were to hold that, where services purchased outside the group are supplied by a company's main establishment located in a third country to a branch of the same company being established in a Member State and belonging to a VAT group constituted in that Member State and where the supplies are accompanied by an allocation to the branch of costs for the external purchases, those supplies constitute taxable transactions for VAT purposes, it would be necessary to respond to the second question raised by the referring court.

81. In its second question, the referring court wishes to know whether the main establishment of this company should be viewed 'as a taxable person not established in the Member State within the meaning of Article 196 of the [VAT Directive], with the result that the purchaser is to be taxed for the transactions'.

82. According to Skandia America Corporation and the Commission, assuming that the supplies between the main establishment and the branch are taxable, VAT is payable by the VAT group under Article 196 of the VAT Directive which provides that VAT is payable by any taxable person to whom the services referred to in Article 56 of that directive are supplied.

83. According to Skandia America Corporation and the Commission, in a situation where a fixed establishment, belonging to a taxable person with its seat abroad, joins a VAT group in the Member State where that group is established, it is necessary to regard that establishment as non-existent, for VAT purposes, beyond its membership of the group. The Commission therefore proposes a teleological interpretation of Article 196 of the VAT Directive which would lead to the conclusion that Skandia America Corporation should be viewed as a taxable person not established in the Member State in question and that VAT is payable by the VAT group as the purchaser of the services referred to in Article 56 of the VAT Directive.

84. Meanwhile, the Skatteverket considers that the conditions for Article 196 of the VAT Directive are not satisfied in this case since, through the intermediary of its Swedish branch, the supplier of services in question, namely Skandia America Corporation, is established within the same Member State as the purchaser of services, that is, in Sweden. The Skatteverket therefore considers that the fact that the Swedish branch of Skandia America Corporation is included in the Swedish VAT group does not prevent the company from being regarded as a taxable person in Sweden. As a result, according to the Skatteverket, VAT is payable by Skandia America Corporation on the basis of Article 193 of the VAT Directive.

85. I am not convinced by the Skatteverket's position. I would point out that the second question is only relevant if, as a result of the answer to the first question, the transactions between Skandia America Corporation as main establishment and its Swedish branch are taxable. That implies that the Swedish branch furthermore cannot be regarded as an establishment of the supplier of services but as forming part of the purchaser of services, namely the VAT group. I therefore share the view of Skandia America Corporation and the Commission that, in such a situation, VAT would be payable by the VAT group pursuant to Article 196 of the VAT Directive.

86. This conclusion may seem absurd in the eyes of the Skatteverket since Skandia America Corporation is clearly established in Sweden through the intermediary of its Swedish branch, but it can only be reached if one accepts the Skatteverket's position that the case-law in *FCE Bank* (EU:C:2006:196) does not apply when the branch belongs to a VAT group. In my opinion, these contradictions constitute a further reason for not accepting the position taken by the Skatteverket and the Commission in relation to the first question.

87. The reply to the second question must therefore be that Article 196 of the VAT Directive must be interpreted as meaning that, where the main establishment of a company is located in a third country and is a supplier and taxable person not established in the Member State where it has a branch, it is the purchaser of services, that is, the VAT group to which the branch belongs, that must be taxed on the services in question, in accordance with Article 56 of that directive.

VI – **Conclusion**

88. I therefore propose that the Court should give the following answer to the questions referred by the förvaltningsrätten i Stockholm:

– Primarily:

(1) Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the branch of a company constituted in compliance with the law of a third country cannot, independently of that company, be registered in a group formed by several companies regarded as a single taxable person for value added tax and constituted in the Member State in which it is established. The supplies of services taking place between the main establishment and the branch do not constitute taxable transactions for the purposes of value added tax, unlike the supplies of services taking place between the branch and its customers, whether or not these are members of the group.

– In the alternative:

(2) Article 196 of Directive 2006/112 must be interpreted as meaning that, where the main establishment of a company is located in a third country and is a supplier and taxable person not established in the Member State where it has a branch, it is the purchaser of services, that is, the group formed by several companies regarded as a single taxable person for value added tax to which the branch belongs, that must be taxed on the services in question, in accordance with Article 56 of that directive.