Value Click case, Supreme Administrative Court , 11 December 2020

No. 420174

3rd, 8th, 9th and 10th chambers combined
Mr. Philippe Ranquet, rapporteur
Mr. Laurent Cytermann, public rapporteur
SCP BARADUC, DUHAMEL, RAMEIX, lawyers

Reading of Friday, December 11, 2020

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

In view of the following procedure:

Conversant International Ltd, formerly known as Valueclick International Ltd, applied to the Paris Administrative Court for a discharge from the corporate tax contributions to which it was subject for the years 2009, 2010 and 2011, from the value added tax reminder imposed on it for the period from 10 April 2008 to 30 November 2012 and from the corresponding penalties. By judgment No. 1508234/2-1 of 7 March 2017, the Paris Administrative Court dismissed its application.

By judgment No. 17PA01538 of March 1, 2018, the Paris Administrative Court of Appeal, on appeal by Conversant International Ltd, annulled this judgment and discharged this company from the value added tax duties claimed from it for the period from April 10, 2008 to November 30, 2012, from the corporate tax contributions to which it was subject for the years 2009, 2010 and 2011 and the corresponding penalties.

By an appeal and two briefs in reply, registered on April 26, 2018 and January 28 and October 22, 2019 at the litigation secretariat of the Council of State, the Minister of Action and Public Accounts asks the Council of State:

1) to annul this judgment;

2) settling the case on the merits, to dismiss the appeal of Conversant International Ltd.

Having regard to the other documents in the case file;

Having regard to:
- Council Directive 2006/112/EC of 28 November 2006;
- the Convention between France and Ireland for the prevention of double taxation and the prevention of tax evasion with respect to income tax, signed on 21 March 1968;
- the General Tax Code and the Book of Tax Procedures;
- the Code of Administrative Justice;

Having heard in public session:

- the report of Mr Philippe Ranquet, Master of Requests,

- the submissions of Mr Laurent Cytermann, Public Rapporteur;

The floor having been given, after the submissions, to SCP Baraduc, Duhamel, Rameix, lawyer for Conversant International Ltd;

Having regard to the note in deliberation, registered on 20 November 2011, submitted by Conversant International Ltd;

1. It is apparent from the documents in the case submitted to the trial judges that the company known, during the period in dispute, as Valueclick International Ltd, whose registered office is located in Ireland and whose company name is now Conversant International Ltd (hereinafter "the Irish company"), wholly owned by the American company then known as Valueclick Inc, carries out a digital marketing activity, in particular in Europe, through sister companies and in particular, in France, through the SARL then known as Valueclick France (hereinafter "the French company"). The Irish company offers its customers services known as "Media", "Affiliate Marketing" and "Technologies", an intellectual property rights licensing agreement concluded on 30 June 2008 with Valueclick Inc authorising it to exploit the rights relating to these products on all markets outside North America. In performance of a service provision agreement ("Intercompany Services Agreement") entered into between the group companies on 1 July 2008, the French company must provide the Irish company with the following services: "marketing assistance consisting of acting as the marketing representative of Valueclick International, which includes, but is not limited to, identifying, prospecting and reporting potential customers to Valueclick International", "ongoing management services and back-office support services", "administrative assistance, including accounting, human resources management, information technology and treasury"; in return, it is reimbursed for its costs ("cost") and receives a fee equal to 8% of the amount of these costs.

2. Following an accounting audit, the tax authorities considered that Valueclick International Ltd was carrying out a taxable activity in France, through a permanent establishment constituted by

Valueclick France. Valueclick International Ltd was therefore subject to corporate tax for the years 2009, 2010 and 2011 and a value added tax arrears were imposed on it for the period from 10 April 2008 to 30 November 2012. By a judgment of 7 March 2017, the Paris Administrative Court dismissed Conversant International Ltd's application for discharge from these contributions and arrears as well as the corresponding penalties. The Minister for Action and Public Accounts is appealing in cassation against the judgment of 1 March 2018 by which the Paris Administrative Court of Appeal, on appeal by Conversant International Ltd, annulled this judgment and issued the requested discharge.

On corporate tax:

3. Under the terms of Article 209 of the General Tax Code: "I. Subject to the provisions of this section, the profits subject to corporation tax are determined (...) by taking into account only the profits made in companies operated in France (...) as well as those whose taxation is attributed to France by an international convention relating to double taxation". Furthermore, under the terms of Article 4 of the convention between France and Ireland for the prevention of double taxation and the prevention of fiscal evasion with respect to income tax, signed on 21 March 1968: "1. The industrial and commercial profits of an enterprise of a Contracting State shall be taxable only in that State, unless the enterprise carries on an industrial or commercial activity in the other Contracting State through a permanent establishment situated there. If the enterprise carries on such an activity, tax may be levied in the other State on the profits of the enterprise, but only so much as those profits are attributable to that permanent establishment. (...) ". Finally, under the terms of Article 2 of the same Convention: "For the purposes of this Convention: (...) / 9. The term "permanent establishment" means a fixed place of business in which an enterprise carries on all or part of its business. / (...) c) A person acting in a Contracting State on behalf of an enterprise of the other Contracting State, other than an agent of an independent status, referred to in subparagraph (d) below, shall be deemed to be a "permanent establishment" in the first-mentioned State if he has, and habitually exercises, in that State an authority to conclude contracts in the name of the enterprise, unless the activity of that person is limited to the purchase of goods or merchandise for the enterprise. (...) ".

4. To have a permanent establishment in France within the meaning of the provisions cited above, a company resident in Ireland must either have a fixed place of business through which it carries out all or part of its activity, or have recourse to a non-independent person habitually exercising in France powers enabling him to engage it in a commercial relationship relating to the operations constituting its own activities. A French company which habitually,even if it does not formally conclude contracts on behalf of the Irish company, decides on transactions which the Irish company merely ratifies and which, thus ratified, bind it.

5. It is clear from the Court's findings that, while the Irish company sets the model for contracts concluded with advertisers to provide them with the services it operates and the general pricing conditions, the choice to conclude a contract with an advertiser and all the tasks required to conclude it are the responsibility of the employees of the French company, with the Irish company merely validating the contract by a signature that is automatic. It follows from what has been said in

point 4 that the Court erred in law and erred in legal classification in holding, on the grounds that the contracts with French customers were signed, under the conditions recalled above, by the Irish company, that the French company was not, for it, a permanent establishment within the meaning of Article 2.9 (c) of the Franco-Irish Convention.

6. The Minister is therefore entitled to request that the contested judgment be set aside in so far as it discharges Conversant International Ltd from the corporation tax contributions imposed on it for the years 2009, 2010 and 2011 and the corresponding penalties.

On value added tax:

As regards the legal framework:

7. It is clear from the documents in the case submitted to the trial judges that, for the years 2008 and 2009, the tax authorities based the disputed reminder of value added tax on the provisions then in force, on the one hand, of Article 259 of the General Tax Code, under the terms of which: "The place of provision of services is deemed to be in France when the service provider has in France the registered office of its business or a permanent establishment from which the service is provided or, failing that, its domicile or habitual residence." and, on the other hand, of Article 283 of the same code, under the terms of which: "1. Value added tax must be paid by the persons who carry out the taxable transactions (...). However, when the delivery of goods or the provision of services is carried out by a taxable person established outside France, the tax is paid by the purchaser, the recipient or the customer (...) ".

8. For the application of these provisions, which result from the transposition into national law of Article 9 of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes and Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in the version in force during the tax period in dispute, which reproduced its content, it is appropriate, as the Court of Justice of the European Communities held in particular in its judgments in Berkholz of 4 July 1985 (C-168/84, paragraphs 17 and 18) and ARO Lease BV of 17 July 1997 (C-190/95, paragraphs 15 and 16), to determine the point of connection of the services rendered in order to to establish the place of provision of services. The place where the service provider has established the registered office of his economic activity appears to be a priority point of connection, taking into consideration another establishment from which the services are provided being of interest only in the case where the connection to the registered office does not lead to a rational solution from a tax point of view or creates a conflict with another Member State. An establishment may only be usefully regarded, by way of derogation from the priority criterion of the registered office, as the place of provision of services by a taxable person if it has a sufficient degree of permanence and a structure capable, from the point of view of human and technical equipment, of making the services in question possible, independently.

9. Thus, until 31 December 2009, the connection of services either to an establishment meeting the criteria set out in the previous point which the service provider has in France, or to the headquarters

of its economic activity located in the territory of another Member State, determines whether the value added tax on these services is due in France or in the other Member State.

10. It is also clear from the documents in the case submitted to the trial judges that, for the years 2010 to 2012, the tax authorities based the disputed reminder of value added tax on the provisions applicable from 1 January 2010, on the one hand, of Article 259 of the General Tax Code, under the terms of which: "The place of provision of services is located in France: 1° When the recipient is a taxable person acting as such and has in France: a) The headquarters of his economic activity, except when he has a permanent establishment not located in France to which the services are provided; b) Or a permanent establishment to which the services are provided; c) Or, failing a or b, his domicile or habitual residence (...). " and, on the other hand, of Article 283 of the same code, under the terms of which: "1. Value added tax must be paid by the persons who carry out the transactions taxable (...). 2. When the services mentioned in 1° of article 259 are provided by a taxable person who is not established in France, the tax must be paid by the recipient.

11. It follows from these provisions, resulting from the transposition into domestic law of Articles 44, 192a, 193, 194 and 196 of the Directive of 28 November 2006 in their version in force from 1 January 2010, clarified in particular by the judgment of the Court of Justice of the European Union GST Sarviz AG Germania of 23 April 2015 (C-111/14, paragraphs 20 to 25), as well as Article 53 of Council Regulation No 282/2011 of 15 March 2011 laying down implementing measures for the same Directive, that where the place of supply of services is in France because they are provided to taxable persons meeting the conditions defined in Article 259 of the General Tax Code, the person liable for the relevant value added tax is the service provider who supplies them if he is himself established in France. A service provider who has a permanent establishment in France from which the services are provided and who meets the criteria set out in point 8 must be regarded as such, which criteria remain relevant under the new provisions, as is clear in particular from the judgment of the Court of Justice of the European Union in Welmory of 16 October 2014 (C-605/12, points 53 to 58). Since the services can be linked to such an establishment, there is no need to determine whether this link is more fiscally rational than a link to the seat of the service provider's economic activity.

With regard to the taxation of the Irish company:

12. In order to rule that Valueclick International was not liable for value added tax relating to the services invoiced to its customers established in France pursuant to the provisions cited above, the court held that, neither for the period from 10 April 2008 to 31 December 2009, nor for the period from 1 January 2010 to 30 November 2012, could it be regarded as having a permanent establishment in France.

13. After noting that the French company had the personnel necessary for the marketing operations in France of the Valueclick group's products, as well as for the provision to the Irish company of the management and support services provided for in the intragroup services contract of 1 July 2008, the administrative court of appeal considered, on the one hand, that these employees could not decide alone on the posting of advertisements online, since the launch of the programmes was

always subject to the prior signature of the contracts by the directors of the Irish company and, on the other hand, that the infrastructure necessary for the delivery of the Media, Affiliate Marketing and Technology service lines was grouped together in data centres located in the United States, the Netherlands and Sweden, that none of this equipment was located on French territory and that the limited IT equipment available to the French company was not of the nature of a data centre and was not powerful enough to support the processing of the advertising campaigns. The court concluded that Valueclick International Ltd did not have in France, through Valueclick France, either the human or technical equipment capable of making it possible, independently, to provide the services in dispute.

14. However, it is clear from the documents in the case submitted to the trial judges that the French company has the human resources that make it possible, independently, to provide the services of the Irish company, in particular the human resources that enable it to take the decision to conclude a contract with an advertiser granting it the benefit of the services operated by the Irish company.

15. It is also clear from the documents in the case submitted to the trial judges, in particular the contract proposed to the advertisers and the technical note produced by Conversant International Ltd, that while the execution of the real-time contact functionalities for advertisers and website publishers requires a technical infrastructure, including the software necessary for the operation of the contact platforms and the servers on which they are hosted, located in data centres, the creation, configuration and management of the customer account by the employees of the French company, pursuant to the contract concluded with an advertiser, are sufficient to effectively provide the latter with access to the functionalities provided for in the contract adapted to the needs of its advertising programmes, without restriction and without any specific intervention being required on the part of group companies separate from the French company and the Irish company, responsible for the development and maintenance of the software or the operation of the servers. It is thus clear from the documents in the case submitted to the trial judges that the employees of the French company must be regarded as having appropriate technical means making it possible, independently, to provide the services of the Irish company, even though no data centre used to perform the connection functions is located in France, nor in Ireland.

16. Consequently, the Minister is justified in arguing that in finding that Valueclik International Ltd did not have in France, through Valueclik France, a permanent establishment satisfying the criteria mentioned in point 8 and was therefore not liable in France for value added tax, the Administrative Court of Appeal incorrectly characterised the facts submitted to it.

17. It follows from all of the above, without there being any need to examine the other grounds of appeal, that the Minister is justified in requesting the annulment of the judgment he is appealing.

18. The provisions of Article L. 761-1 of the Code of Administrative Justice prevent the State, which is not the losing party in these proceedings, from being charged with the sum requested by Conversant International Ltd as costs of the proceedings.

DECIDES:

Article 1: The judgment of the Paris Administrative Court of Appeal of 1 March 2018 is annulled.

Article 2: The case is referred back to the Paris Administrative Court of Appeal.

Article 3:The conclusions presented by the company Conversant International Ltd under Article L. 761-1 of the Code of Administrative Justice are rejected.

Article 4: This decision will be notified to the Minister of Economy, Finance and Recovery and to the company Conversant International Ltd.

See also

- http://www.conseil-etat.fr/fr/arianeweb/CE/analyse/2020-12-11/420174
- http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2020-12-11/420174