Case C-331/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 April 2019

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

19 April 2019

Applicant:

Staatssecretaris van Financiën

Other party to the proceedings:

X

Subject of the action in the main proceedings

The main proceedings concern additional assessments that the Inspecteur van de Belastingdienst (tax inspector; 'the Inspector') imposed on X ('the party concerned'), because the Inspecteur took the view that the general VAT rate was applicable to certain products supplied by the party concerned. The party concerned disputed those assessments, on the basis that the lower VAT rate for foodstuffs it already paid on the products was applicable.

Subject matter and legal basis of the request for a preliminary ruling

The present request under Article 267 TFEU concerns the application of the reduced VAT rate to foodstuffs. In particular, it concerns the question of on the basis of which criteria can it be determined whether products can fall under the term 'foodstuffs for human consumption' or under the term 'products normally used to supplement foodstuffs or as a substitute for foodstuffs' within the meaning of the 2006 VAT Directive.

Questions referred

1. Must the term 'foodstuffs for human consumption' used in point 1 of Annex III to the 2006 VAT Directive be interpreted as covering, in accordance with Article 2 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans?

   If this question is answered in the negative, how must that term then be defined?

2. If edible or potable products cannot be regarded as foodstuffs for human consumption, on the basis of which criteria must it then be assessed whether such products can be regarded as products normally used to supplement foodstuffs or as a substitute for foodstuffs?

Provisions of EU law cited

Articles 96, 97 and 98 of, and point 1 of Annex III to, to 2006 VAT Directive, and Article 2 of Regulation No 178/2002

Provisions of national law cited

Article 7 and Article 9(2)(a) and item a.1 of Table [I] of the Wet op de omzetbelasting 1968 (Law on turnover tax 1968; 'the Wet').

Brief summary of the facts and the procedure in the main proceedings

1 The party concerned is an operator which sells certain products as sexual stimulants. Those are capsules, drops, powders and sprays that are intended to be taken orally. Over periods in the years between 2009 and 2013, the interested party paid turnover tax on the supplies of those products on the basis of a return at the reduced VAT rate of six percent as referred to in Article 9(2)(a) of the Wet in conjunction with item a.1 of Table I of the Wet (Table I) because, in its view, the products are foodstuffs within the meaning of that table item. The Inspector, however, took the view that the products were not foodstuffs and were therefore not subject to the general VAT rate. For that reason, the Inspector imposed the additional tax assessments at issue.

2 The Gerechtshof Den Haag (Court of Appeal, The Hague; 'the Gerechtshof') held on appeal that the products were foodstuffs within the meaning of item a.1 of Table I The Staatssecretaris van Financiën (State Secretary for Finance) lodged an appeal in cassation against that decision before the Hoge Raad.

Principal arguments of the parties in the main proceedings

3 In reasoning its decision, the Gerechtshof stated that the products in question ought to be taken orally and that they contained components specific to foodstuffs intended for human use. That the products are promoted and used as sexual stimulants does not, in the view of the Gerechtshof, preclude the application of the reduced rate. With that finding, the Gerechtshof took account of the fact that, according to the parliamentary explanatory notes on Table I, the legislator favours a broad interpretation of the concept of 'foodstuff'. In the Gerechtshof's view, making a distinction according to the purpose for which products are consumed is not in keeping with that objective. Products which are not immediately reminiscent of a foodstuff, such as sweets (including chewing gum) and cakes, also fall within the scope of the reduced rate.

4 The Staatssecretaris van Financiën argues that the Gerechtshof's interpretation of item a.1 of Table I, in particular of the term 'food and beverages normally intended for human consumption' used there, is contrary to the wording and scheme of point 1 of Annex III to the 2006 VAT Directive.

Brief summary of the reasons for the referral

5 Pursuant to Article 9(2)(a) of the Wet, the tax amounts to six per cent for supplies of the goods listed in Table 1. Item a.1 of Table I reads:

'1. foodstuffs, in particular:

(a) food and beverages normally intended for human consumption;

(b) products clearly intended for use in the preparation of food and beverages as referred to under point (a) and that are wholly or partly contained therein;

(c) products intended for use to supplement or as a substitute for food or beverages as referred to under (a), with the proviso that alcoholic drinks are not considered foodstuffs'.

With those provisions, the Netherlands legislature made use of the possibility afforded to Member States by Article 98 of the 2006 VAT Directive to apply a reduced rate to those supplies of goods that belong to the categories listed in Annex III to that directive. In the Dutch language version of point 1 to Annex III, the following category of goods is set out:

'(1) Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs'.

The text and legislative history of item a.1 of Table I does not contain any indication that the legislator intended selectively to apply point 1 of Annex III to the 2006 VAT Directive, regarding goods suitable for human consumption, in the sense that the reduced VAT rate would apply only to certain goods that can be listed under point 1 of Annex III to the 2006 VAT Directive. That is why, in interpreting item a.1 of Table I, recourse must be had to the terms used in point 1 of Annex III. In that regard, 'foodstuffs for human consumption' ('foodstuffs') can be equated with 'food intended for human consumption'.

6 The Court of Justice of the European Union ('the Court') has in this connection ruled that Annex III to the VAT Directive 2006 is intended to make certain goods and services considered particularly necessary cheaper and thus more accessible to the final consumer that ultimately bears the VAT, by making it possible for those goods and services to be subjected to a reduced rate. This is an exception to the principle that supplies of goods and services are subject to a standard rate which may not be less than 15% (cf. Articles 96 and 97 of the VAT Directive 2006). It is clear from the case-law of the Court that such exceptions to a general rule must be interpreted strictly. Also, according to the case-law of the Court, certain terms that are listed in Annex III but not defined have to be interpreted in the light of the context in which they are used in the directive and account being taken of their usual meaning. Although the Court presently holds specifically with regard to the term 'foodstuffs' that its interpretation must take account of the context in which it is used in the 2006 VAT Directive, it has not yet determined whether that also applies to its usual meaning.

7 The goods referred to in point 1 of Annex III cover all foodstuffs for human and animal consumption and are subdivided into: (a) foodstuffs as such, (b) products used to supplement or as a substitute for foodstuffs, and (c) products normally intended for use as a constituent or ingredient in the preparation of foodstuffs (cf. judgment of the Court of 3 March 2011, *Commission* v *Netherlands*, C-41/09, EU:C:2011:108, paragraph 50). In answering the question of whether a product can be regarded as a foodstuff, no distinction or reservation whatever may be made according to the kind of business, method of selling, packaging, preparation or temperature (cfl. judgment of the Court of 10 March 2011, *Bog and Others*, Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135; 'the *Bog* judgment', paragraph 85). It does seem important that food and meals prepared for immediate consumption serve 'as food' for consumers (cf. the *Bog* judgment, paragraph 87). It is established that the products in question, by virtue of their composition, are suitable to be taken orally by humans and that they are also intended for that purpose. They are not to be regarded as constituents or ingredients used in the preparation of foodstuffs. It is therefore necessary to assess whether the products fall within the category referred to by the Court as 'foodstuffs as such' or whether they fall into the category 'products used to supplement or as a substitute for foodstuffs'.

8 In the view of the Hoge Raad, the criteria for that assessment cannot with certainty be derived from the case-law of the Court. The doubts which arise in that respect are set out in paragraphs 9 to 12 below.

9 Dictionaries in various Member States define 'foodstuffs' as products or food or beverages which serve to maintain the physical person by providing him with nutrients. The Hoge Raad is in doubt as to whether that meaning can be used as a criterion against the background of the context of the directive, as such an interpretation would lead to practical problems and legal uncertainty. There are, after all, food and beverages which serve more purposes than the maintenance of the physical person. In addition, the Court does not seem to use the usual meaning of the term 'foodstuffs' as a criterion for interpreting it (see paragraph 83 of the *Bog* judgment). It is conceivable that the criterion for determining whether a product is a foodstuff, viewed in the context of the 2006 VAT Directive, may have to be found in the usual sense of the term, but that the meaning used in (national) dictionaries is not decisive in this respect. If that is the case, the question arises as to what customary meaning must then be attached to that term. The Hoge Raad is of the view that, in the absence of guiding rulings on the matter from the Court, further guidance is needed in order for a uniform interpretation of the term foodstuffs to be guaranteed in all Member States.

10 It can also be argued that the criterion for interpreting the term 'foodstuffs' cannot be found in its usual meaning. Another possibility is alignment with the definition of the term 'foodstuffs' to be found in Regulation No 178/2002. Article 2 of that Regulation defines the term 'food or foodstuff' as:

> 'any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be, ingested by humans. "Food" includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. ...'

In addition, the same Article 2 lists a number of products which meet that definition but which are explicitly not regarded as food. The Hoge Raad notes that, for the interpretation of certain terms from the 2006 VAT Directive, the Court has previously referred to EU legislation in areas of law other than VAT. However, an interpretation of the term 'food or foodstuff' in accordance with Regulation No 178/2002 does not seem compatible in the light of point 1 of Annex III. The EU legislature, after all, considered it necessary explicitly to include within the scope of point 1 of Annex III products which are fit for human consumption but which are not consumed as food as such. If products normally used to supplement foodstuffs or as a substitute for foodstuffs or products normally intended for use as a constituent or ingredient in the preparation of foodstuffs were already regarded as foodstuffs in themselves, it would not appear necessary for those products still to be designated separately as products to be listed in point 1 of Annex III.

11 The Hoge Raad considers that alignment with the definition of food in Article 2 of Regulation No 178/2002 constitutes a criterion — which is easy to apply — for the interpretation of the term 'foodstuffs' which promotes a uniform interpretation of the term in all Member States. However, it is not beyond reasonable doubt that the simplicity of a criterion to be used for the interpretation of the term 'foodstuffs' should have the greatest weight.

12 If the usual meaning of the term 'foodstuffs' is not the criterion for the interpretation of that term, and if it is not possible to have recourse to the homonymous term in Regulation No 178/2002, a different criterion will have to be applied. The question is what that criterion should be. Neither the wording and the context of the 2006 VAT Directive nor the case-law of the Court provides clarity in this respect.

13 If, according to point 1 of Annex III to the 2006 VAT Directive, the products cannot be regarded as foodstuffs in the strict sense, the question arises as to whether the products must be regarded as products normally used to supplement foodstuffs or as a substitute for foodstuffs It is not clear which criteria apply in such a scenario. One view may be that that term is limited to preparations intended to be taken orally in order to compensate for any nutritional deficiencies. In that case, the fact that a product is not advertised as supplementing or substituting a nutritional deficiency would preclude that product from being covered by that term. Another view may be that, for a preparation to be regarded as a supplement of foodstuffs or as a substitute for them, it is sufficient that the information on the packaging indicates that it contains nutrients that are also present in foodstuffs as such.

14 The abovementioned doubts bring the Hoge Raad to refer the questions set out above to the Court for a preliminary ruling.