Case C-515/20

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:

14 October 2020

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

10 June 2020

Applicant:

B AG

Defendant:

Finanzamt A

Subject matter of the main proceedings

Directive 2006/112/EC – Interpretation of the term ‘wood for use as firewood’ in Article 122 – Admissibility of the coverage of Article 122 established by a Member State using the Combined Nomenclature – Applicable criteria

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Is the term ‘wood for use as firewood’ in Article 122 of Directive 2006/112/EC to be interpreted as meaning that it includes any wood which, on the basis of its objective properties, is intended exclusively for burning?

2. Can a Member State which introduces a reduced rate for supplies of wood for use as firewood on the basis of Article 122 of Directive 2006/112/EC

establish its precise coverage using the Combined Nomenclature in accordance with Article 98(3) of Directive 2006/112/EC?

3. If the answer to Question 2 is in the affirmative: May a Member State exercise the power conferred on it by Article 122 of Directive 2006/112/EC and Article 98(3) of Directive 2006/112/EC to establish the coverage of the reduced rate for supplies of wood for use as firewood using the Combined Nomenclature in keeping with the principle of tax neutrality, in such a way that supplies of various forms of wood for use as firewood, which differ in terms of their objective characteristics and properties but which, from the point of view of the average consumer, address the same need (in this case, heating), on the basis of the criterion of comparability in terms of use, and are thus in competition with each other, are subject to different rates of taxation?

Provisions of EU law cited

Annex 1 to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Implementing Regulation (EU) No 1101/2014 of 16 October 2014 (the Combined Nomenclature; 'the CN')

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, as amended by Council Directive 92/77/EEC of 19 October 1992, in particular the third subparagraph of Article 12(3)(a), read in conjunction with Annex H thereto

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 98 and 122

Provisions of national law cited

Umsatzsteuergesetz (Law on Value Added Tax; 'the UStG'), in particular Paragraph 12(2), point 1, read in conjunction with point 48 of Annex 2

Brief summary of the facts and procedure

1 The parties are in dispute over the application of the reduced rate of value added tax to the supply of wood chips.

2 In December 2015, the applicant supplied wood chips to various customers and invoiced them for the cost of the wood chips plus 7% value added tax.

3 The defendant contends that the applicant's supplies are subject to the standard rate of value added tax of 19%, not a reduced rate of 7%. The applicant contests that.

Brief summary of the basis for the reference

Legal framework

EU law

4 Article 98 of Directive 2006/112 provides as follows:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

…

3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned.'

5 Article 122 of Directive 2006/112 allows the Member States to apply a reduced rate of VAT to; inter alia, supplies of wood for use as firewood. That article was included in the special provisions of the Directive that applied pending introduction of the definitive arrangements for value added tax (Article 109 et seq.).

6 Heading 4401 of the CN includes the following subheadings:

CN Code	Description
4401	Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; Wood in chips or particles; Sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms
4401 10 00	– Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms
	– Wood in chips or particles
4401 21 00	– – Coniferous
4401 22 00	– – Non-coniferous
	– Sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms
4401 31 00	– – Wood pellets
4401 39	– – Other
4401 39 20	– – – Agglomerated (e.g. in briquettes)
	– – – Other

4401 39 30	– – – – Sawdust
4401 39 80	– – – – Other

National law

7 The German legislature provided in Paragraph 12(2), point 1, of the UStG, read in conjunction with point 48 of Annex 2 to the UStG, for the rate on supplies of certain forms of wood, namely (a) fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; and (b) sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms, to be reduced to 7%.

8 Annex 2 to the UStG refers to the CN. According to the case-law of the referring court, the classification of goods under the headings or subheadings of the CN, and thus the coverage of the reduced rate, depends exclusively on customs provisions and definitions.

9 Where coverage for customs purposes is established thus, the reduced rate cannot apply to supplies of wood chips, which, as wood in the form of particles, have to be classified under subheading 4401 21 00 or 4401 22 00 of the CN and is therefore not covered by Article 12(2), point 1, of the UStG, read in conjunction with point 48 of Annex 2 thereto.

10 The wood chips at issue in this case are intended solely for use as fuel. They compete with other forms of wood which, like sawdust agglomerated in pellets or briquettes, are usually used as fuel and are supplied subject to the reduced rate in accordance with Paragraph 12(2), point 1, of the UStG, read in conjunction with point 48 of Annex 2 thereto.

Question 1

11 The first question referred seeks interpretation of the term ‘wood for use as firewood’ in Article 122 of Directive 2006/112. Where EU law (in this case, Article 122) makes no express reference to the law of the Member States, the Member States are required, when specifying the categories of goods to which they apply a reduced rate of VAT, to respect the limits of the categories as interpreted by the Court of Justice (see judgment of 17 January 2013, *Commission* v *Spain*, C-360/11, EU:C:2013:17, paragraph 19 et seq.).

12 When interpreting the term ‘wood for use as firewood’ in Article 122 of Directive 2006/112, the way in which it is used in everyday language (judgment of 17 January 2013, *Commission* v *Spain*, C-360/11, EU:C:2013:17, paragraph 63 on Annex III to Directive 2006/112) might suggest that it includes any wood which, on the basis of its objective properties, is intended exclusively for burning.

Question 2

13 The referring court has doubts as to whether, in exercising the possibility provided in Article 122 of Directive 2006/112, the Member States have the power to establish the precise coverage of a reduced rate on supplies of wood for use as firewood using the CN. Although Article 98(3) of Directive 2006/112 provides for such a power in principle, the referring court has doubts as to whether that power extends to Article 122 or whether it is restricted to supplies of goods in the categories listed in Annex III to the Directive.

14 The fact that the term 'category concerned' in Article 98(3) of Directive 2006/112 echoes the wording in Article 98(2) referring to the 'categories listed in Annex III' might corroborate such a restriction. Furthermore, on the basis of the scheme of the provision, Article 98(2) gives specific expression to the rule laid down in Article 98(1), to which Article 98(3) explicitly refers.

15 On the other hand, the words 'applying the reduced rates provided for in paragraph 1' in Article 98(3) of Directive 2006/112 might also be understood as meaning that the power to establish coverage using the CN exists independently of the provision on which the possibility afforded to the Member State to apply a reduced rate is based. This would be consistent with the fact that Article 122 (provisionally) extends the possibility derived from Article 98(1) and (2) of applying a reduced rate of VAT (see judgment of 5 September 2019, *Regards Photographiques*, C-145/18, EU:C:2019:668, paragraph 44 on Article 103 of the Directive).

16 Given its provisional nature, it would have been difficult, from a technical and legal point of view, to include the categories listed in Article 122 of Directive 2006/112 in Article 98(2) of, read in conjunction to, Annex III to the Directive. That being so, the fact that the power to establish coverage using the CN is now regulated outside Annex III to Directive 2006/112, which was not the case under the earlier legislation enacted in the third subparagraph of Article 12(3)(a) of, read in conjunction with Annex H to, Directive 77/388, might suggest that the legislature deliberately decided to extend that power to the possibility of applying a reduced rate included in the transitional provisions of Article 109 et seq. of Directive 2006/112.

Question 3

Selective application of the reduced rate of VAT (only) in keeping with the principle of tax neutrality

17 Inasmuch as the Member States are authorised to apply a reduced rate to certain categories of supplies, they may decide, in keeping with the case-law of the Court of Justice, to apply the reduced rate to just one particular and specific aspect of the respective category. If a Member State decides to apply the reduced rate of VAT selectively, it must do so in keeping with the principle of tax neutrality. That

principle precludes similar goods or services which are in competition with each other from being treated differently for VAT purposes (see judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others*, C-597/17, EU:C:2019:544, paragraph 44 et seq.).

Doubts as to the criterion for determining the similarity of two items

18 The referring court has doubts as to the criterion that has to be applied to determine the similarity of two items for the purposes of selective application of the reduced rate of VAT.

19 In that regard, the referring court has ruled in connection with the third subparagraph of Article 12(3)(a) of, read in conjunction with Annex H to, Directive 77/388, that goods classified under different subheadings of the CN are not similar, irrespective of any identical application, and therefore need not be subject to the same rate of VAT, even taking account of the principle of tax neutrality.

20 However, the Court of Justice has since found, with regard to the principle of tax neutrality, that, in order to determine whether two goods or services are similar, account must primarily be taken of the point of view of a typical consumer, avoiding artificial distinctions based on insignificant differences (judgments of 27 February 2014, *Pro Med Logistik and Pongratz*, C-454/12 and C-455/12, EU:C:2014:111, paragraph 53, and of 10 November 2011, *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 43). Two goods or services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the average consumer's decision between the goods or services (judgments of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others*, C-597/17, EU:C:2019:544, paragraph 48, and of 10 November 2011, *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 44).

21 In the light of the foregoing, the referring Chamber has doubts as to whether it can abide by its case-law whereby a different classification for customs purposes means that the goods concerned cannot be similar. That is because whereas, according to the case-law of the Court of Justice cited, the primary point of view of a typical consumer requires an examination of similarity in terms of how the supply is used by a typical consumer, classification for customs purposes fundamentally depends solely on the objective characteristics and properties of the goods (see, most recently, judgment of 30 April 2020, *DHL Logistics (Slovakia)*, C-810/18, EU:C:2020:336, paragraph 25). Although the intended use of the goods may also constitute an objective criterion for classification if it is inherent in the product (judgment of 30 April 2020, *DHL Logistics (Slovakia)*, C-810/18, EU:C:2020:336, paragraph 26), the intended use may be a relevant criterion only where the classification cannot be made on the sole basis of the objective

characteristics and properties of the goods (judgment of 5 September 2019, *TDK-Lambda Germany*, C-559/18, EU:C:2019:667, paragraph 27).

22 In this case, those two criteria give different results: From the point of view of an average consumer, the wood chips at issue in this case are not fundamentally different from other forms of wood for use as firewood which are supplied subject to the reduced rate, as they are likewise used for burning and generating heat in stoves. In terms of their objective characteristics and properties, however, wood chips are visibly different from other such forms of wood for use as firewood due to the particular way in which they are processed (chopped), their resultant form and the circumstances in which they are used as fuel. Depending on the criterion applied, wood chips are or are not similar to other forms of wood for use as firewood.

Meaning of power to establish coverage using the CN

23 The doubt as to the criterion that must be applied to determine similarity revolves around the meaning of the power of the Member States to establish the precise coverage of a reduced rate using the CN. If similarity has to be determined solely from the point of view of a typical consumer, the possibility of determining coverage using the CN would ultimately be pointless in this case and would be significantly restricted in general, over and beyond this case, even though the Member States are expressly empowered to do so under Article 98(3) of Directive 2006/112.

24 The Court of Justice too has previously noted in a different context that the principle of tax neutrality cannot preclude an exemption expressly authorised by the legislature or impair its effectiveness (judgment of 8 February 2018, *Commission* v *Germany*, C-380/16, EU:C:2018:76, paragraph 58; see also Opinion of Advocate General Sharpston of 8 May 2012 in Case C-44/11, EU:C:2012:276, point 60). However, the restriction on the principle of tax neutrality in this case depends on the Member State exercising the power to establish coverage using the CN and is therefore based only indirectly on legislation enacted in Directive 2006/112.

25 If, nonetheless, the power provided for in Article 98(3) of Directive 2006/112 is an exemption expressly authorised by the legislature in the aforesaid sense, a use that need not be taken into account for the purpose of classification – and the point of view of a typical consumer based on it – could not be invoked against the application of the standard rate based on coverage established using the CN. This would also be in keeping with the principle of strict interpretation of reduced rates, which is to be applied concurrently with the principle of tax neutrality (judgment of 9 March 2017, *Oxycure Belgium*, C-573/15, EU:C:2017:189, paragraph 32). Such a strict interpretation might be even more appropriate in this case, in that Article 122 of Directive 2006/112 constitutes an exemption authorised only for a transitional period (see judgments of 28 February 2012,

Commission v *France*, C-119/11, EU:C:2012:104, paragraph 29, and of 7 March 2002, *Commission* v *Finland*, C-169/00, EU:C:2002:149, paragraph 34).