Case C-703/19

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:

24 September 2019

Referring court:

Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)

Date of the decision to refer:

6 June 2019

Appellant:

J.K.

Respondent:

Dyrektor Izby Administracji Skarbowej w Katowicach (Director of the Tax Administration Chamber in Katowice, Poland)

Subject matter of the main proceedings

Classification of a taxable person's activities as food and beverage services subject to value added tax ('VAT') at a rate of 8% or as a supply of prepared dishes to which a VAT rate of 5% applies.

Subject matter and legal basis of the reference

The scope of the concept of a 'restaurant service' to which a reduced rate of VAT applies; Article 267 TFEU

Questions referred

1. Does the concept of a 'restaurant service' to which a reduced rate of VAT applies (Article 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, as amended), read in

conjunction with point (12a) of Annex III thereto and with Article 6 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1), cover the sale of prepared dishes under conditions such as those in the main proceedings, that is to say, in a situation where:

- the seller makes available to the buyer the infrastructure which enables him or her to consume the purchased meal on the premises (separate dining space, access to toilets);

- there is no specialised waiter service;

- there is no service in the strict sense;

- the ordering process is simplified and partly automated; and

- the customer's ability to customise the order is limited?

2. Is the way in which the dishes are prepared, consisting in, in particular, the heating of certain semi-finished products and the composing of prepared dishes from semi-finished products, relevant to answering the first question?

3. In order to answer the first question, is it sufficient that the customer is potentially able to use the infrastructure offered or is it also necessary to establish that, for the average customer, this element constitutes an essential part of the service provided?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'): Article 98, Annex III

Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax ('Regulation No 282/2011'): Article 6

Provisions of national law cited

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the Tax on Goods and Services) (consolidated text: Dziennik Ustaw (Journal of Laws) of 2011, No 177, item 1054, as amended) ('the Law on VAT'):

Article 5a states that goods or services involved in transactions subject to VAT are to be 'identified' by means of statistical classifications (in so far as the relevant provisions stipulate statistical symbols for those goods or services).

Article 41(2a) provides that a tax rate of 5% applies to the goods listed in Annex 10 to that law.

Item 28 of Annex 10 covers prepared meals and dishes classified under the PKWiU (Polish Classification of Goods and Services) grouping 10.85.1, except for products with an alcohol content in excess of 1.2%.

Rozporządzenie Ministra Finansów z dnia 23 grudnia 2013 r. w sprawie towarów i usług dla których obniża się stawkę podatku od towarów i usług oraz warunków stosowania stawek obniżonych (Regulation of the Minister for Finance of 23 December 2013 on goods and services to which a reduced rate of VAT applies and on conditions for applying reduced rates) (Dziennik Ustaw (Journal of Laws) of 2013, item 1719) ('the Regulation of the Minister for Finance of 23 December 2013'):

Paragraph 3(1)(1) states that a reduced rate of VAT of 8% applies to the goods and services listed in the annex to that regulation.

Annex — point III, item 7:

Food and beverage services (PKWiU ex 56), except for sales of: (1) alcoholic beverages with an alcohol content in excess of 1.2%; (2) alcoholic beverages which are mixtures of beer and non-alcoholic beverages with an alcohol content in excess of 0.5%; (3) beverages prepared using a coffee or tea infusion irrespective of the percentage share of that infusion in the prepared beverage; (4) carbonated non-alcoholic beverages; (5) mineral waters; (6) other unprocessed goods taxed at the rate referred to in Article 41(1) of [the Law on VAT].

Rozporządzenie Rady Ministrów z dnia 4 września 2015 r. w sprawie Polskiej Klasyfikacji Wyrobów i Usług (PKWiU) (Regulation of the Council of Ministers of 4 September 2015 on the Polish Classification of Goods and Services) (Dziennik Ustaw (Journal of Laws) of 2015, item 1676) ('the PKWiU Regulation'):

Paragraph 3(1) provides that for VAT purposes, until 31 December 2017, the Polish Classification of Goods and Services introduced by the Rozporządzenie Rady Ministrów z dnia 29 października 2008 r. w sprawie Polskiej Klasyfikacji Wyrobów i Usług (PKWiU) (Regulation of the Council of Ministers of 29 October 2008 on the Polish Classification of Goods and Services) is applicable.

Division 56.1 of the PKWiU covers 'restaurant and other catering establishment services' (including 'preparing and serving meals in restaurants', 'preparing and serving meals in self-service establishments', and 'other meal-serving services').

The above classification is interpreted by reference to Division 56 and its subclasses contained in the Rozporządzenie Rady Ministrów z dnia 24 grudnia 2007 r. w sprawie Polskiej Klasyfikacji Działalności (PKD) (Regulation of the Council of Ministers of 24 December 2007 on the Polish Classification of

Economic Activities) (Dziennik Ustaw (Journal of Laws) of 2007, No 251, item 1885) ('the PKD Regulation'). As clarified in the PKD Regulation, that division covers: service activities related to the provision of full meals intended for immediate consumption in restaurants, including self-service restaurants and establishments which offer meals 'to take away', with or without seating. What is important here is not the type of facility serving the meals but rather the fact that those meals are intended for immediate consumption. Subclass 56.10.A 'Restaurants and other permanent catering establishments'. That subclass includes the preparation and serving of meals to visitors seated at tables or visitors who choose dishes from the displayed menu, regardless of whether they consume the prepared meals on the premises, take them away or have them delivered. That subclass includes the activities of restaurants, cafés, fast-food restaurants, milk bars, fast-food bars, ice cream parlours, pizzerias and take-away establishments, as well as separate establishments operating as restaurants or bars in means of transport.

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

1 In September 2016, the tax audit office carried out a VAT audit of the taxable person who is the appellant in the main proceedings, which covered the period from January to June 2016. During the audit, incorrect VAT settlements were identified. As a consequence, by decision of 21 April 2017, the tax authority issued a VAT assessment to the taxable person for the period covered by the audit as a result of its determination that the taxable person's entire activity consisted in food and beverage services taxed at a rate of 8% rather than in the supply of prepared dishes to which a rate of 5% applies.

2 The essence of the dispute was whether the tax classification of specific products (meals and dishes) sold by the appellant and the application of the reduced rate of 5% thereto (originally, the reduced rate of 8% had been applied) was correct. Those products are intended for immediate consumption by customers within a chain of establishments. The end product is prepared on site from semi-finished products. Prepared meals and dishes are served hot or cold in a form which is ready for consumption on the premises or can be taken away.

3 Within the framework of his economic activity, the taxable person uses a variety of sales methods:

– sales of products to customers inside restaurants;

– sales of products from the window or counter of a restaurant for consumption outside that restaurant ('drive-in' or 'walk-through'); and

– sales of products to customers in designated zones inside shopping centres ('food courts').

4 The tax authorities of both instances disagreed with the appellant's position that his product sales satisfy the conditions for the supply of goods set out in Article 7(1) of the Law on VAT (Article 14(1) of the VAT Directive). The authorities referred to Article 98(2) of the VAT Directive, which provides that Member States may apply reduced rates to prepared meals and dishes where the transactions involving such meals and dishes are classified as supplies of goods or services. Article 98(3) of that directive authorises Member States to use the Combined Nomenclature to establish the coverage of the category concerned. Poland took advantage of that option in Article 5a of the Law on VAT, with the proviso that the provisions on reduced rates of VAT refer to PKWiU symbols. Thus, inclusion in PKWiU code 10.85 'Prepared meals and dishes' means a rate of 5%, and inclusion in PKWiU code ex 56 'Food and beverage services' (restaurant services and other catering services) means a reduced rate of 8%. The authority emphasised that the disputed transactions satisfy both conditions referred to in Article 7(1) of the Law on VAT and Article 14(1) of the VAT Directive, namely: (I) the subject matter of the transaction is goods; and (II) the right to dispose of the goods as owner is transferred.

5 The tax authority found that ready-for-sale dishes are made from semi-finished products which are processed by the staff. The packaging system for the products enables them to be consumed anywhere. The establishments also have other characteristics typical of restaurant/catering services such as, inter alia, the availability of a dining space and toilets, the provision of a number of customer services, Internet access and newspapers available to customers, heating/air conditioning of the premises, the playing of music on the premises and cleaning of the premises.

6 By judgment of 1 March 2018, the Wojewódzki Sąd Administracyjny w Gliwicach (Regional Administrative Court in Gliwice, Poland) dismissed the appellant's action. That court pointed out that it is essential to determine whether a supply of goods or rather a supply of services has taken place in a given case. This requires consideration of all the circumstances in which the transaction occurred in order to determine its characteristics and dominant features. The provision of the service at issue cannot be regarded as a supply of goods, as the meals are prepared and served on the trader's premises and the customer has the option of consuming the purchased meal, even if it is served 'to take away', on the premises, and to take advantage of all the associated facilities.

7 The appellant brought an appeal on a point of law against the judgment of the court of first instance before the referring court, which decided to make a reference to the Court of Justice for a preliminary ruling.

Reasons for the reference

8 The requirements of the VAT Directive must be taken into account in order to determine the proper way to tax the transactions at issue. In the view of the

referring court, the correct determination of the requirements arising from EU law and from the case-law of the Court of Justice raises doubts that necessitate a reference for a preliminary ruling.

9 In point (1) thereof, Annex III to the VAT Directive lists, inter alia, foodstuffs (including beverages except for alcoholic beverages) for human and animal consumption, and in point (12a) it refers to restaurant and catering services, it being possible to exclude the supply of (alcoholic and/or non-alcoholic) beverages.

10 It is apparent from the case-law of the Court of Justice that the term 'foodstuffs' refers to foodstuffs in general and makes no distinction or restriction whatever according to the kind of business, method of selling, packaging, preparation or temperature of the meal. In cases of the supply of goods, the term 'foodstuffs' in category 1 of Annex H to the Sixth Directive (currently Annex III to the VAT Directive) must be interpreted as also covering dishes and meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means (judgment of 10 March 2011, *Finanzamt Burgdorf and Others*, C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135).

11 For its part, 'restaurant services' should be construed as in Article 6 of Regulation No 282/2011 and in the case-law of the Court of Justice.

12 The Polish legislature implemented Article 98 of the VAT Directive together with Annex III thereto in such a way that, pursuant to Article 41(2a) of the Law on VAT, the tax rate applicable to the goods listed in Annex 10 to that law is 5%. Item 28 of Annex 10 covers 'prepared meals and dishes, except for products with an alcohol content in excess of 1.2%' (ex 10.85.1).

13 Pursuant to Paragraph 3(1)(1) of the Regulation of the Minister for Finance of 23 December 2013, a reduced rate of VAT of 8% applies to the goods and services listed in the annex to that regulation. In point III, item 7 thereof, that annex refers to 'food and beverage services' (PKWiU ex 56), with certain exceptions.

14 In national case-law, the view has already been expressed that the Polish legislature could apply the reduced rate only to 'restaurant services' as defined in Article 6 of Regulation No 282/2011 and in the case-law of the Court of Justice.

15 In the view of the referring court, the way in which the national legislation defines the scope of the concept of 'restaurant services' laid down in the VAT Directive is questionable. The construction used in national law not only has different wording ('food and beverage services' as opposed to 'restaurant services'), but also refers to PKWiU ex 56, a classification whose nature is alien to the common system of VAT.

16 Pursuant to Paragraph 3(1) of the PKWiU Regulation, until 31 December 2017 the Polish Classification of Goods and Services was applied for VAT purposes.

Division 56.1 of the PKWiU covers ‘restaurant and other catering establishment services’. The above classification is interpreted by reference to the description of Division 56 and its subclasses contained in the PKD Regulation.

17 In national case-law, the view has been expressed that the term ‘food and beverage services’ used by the national legislature is broader than the term ‘restaurant services’ within the meaning of the VAT Directive. The activity classification methodology for statistical purposes differs significantly from the activity classification methodology for VAT purposes. The Polish legislature constructs the semantic scope of the definition of ‘restaurant services’ on the basis of the activities undertaken by specific operators rather than, as in the case of the VAT system, on the basis of the subject of the tax.

18 The way in which ‘restaurant services’ are defined in the PKWiU affected the scope of regulation of the category ‘Prepared meals and dishes, except for products with an alcohol content in excess of 1.2%’ (ex 10.85.1). In the PKWiU, the name of that category is ‘Prepared meals and dishes’. Only the PKD reference narrows that category down to subclass 10.85.Z ‘Manufacture of prepared meals and dishes’. That subclass covers the production of prepared meals and dishes but does not include the preparation of meals for immediate consumption, which is included in the relevant subclasses of Division 56.

19 Such a way of regulating the scope of ‘restaurant services’ gives rise to doubts on the part of the referring court.

20 Firstly, the Polish legislature had the option of using the Combined Nomenclature to establish the coverage of the category of goods concerned when applying reduced rates, but did not make use of that option. Although a relationship with the Combined Nomenclature is indicated in the PKWiU, that relationship cannot be considered at an abstract level.

21 Secondly, when creating a specific category of goods to which a reduced rate applies, the Polish legislature referred to the Polish statistical classification, in which transactions are understood differently than under the VAT system. In particular, it could be questioned whether the statistical classification ‘Food and beverage services’ is not overly broad compared to the EU definition of ‘restaurant services’, thus affecting the scope of the category ‘Prepared meals and dishes’ and the definitions of the terms used.

22 The referring court is of the view that the concept of ‘prepared meals and dishes’ must be interpreted in accordance with the normal sense of the terms at issue (judgment of 4 June 2015, *Commission* v *Poland*, C-678/13, EU:C:2015:358, paragraph 46). ‘Meals and dishes’ should satisfy two conditions: they should be intended for human consumption and should be prepared for immediate consumption; the manner of their preparation for consumption on the premises is of no relevance here (judgment of 10 March 2011, *Finanzamt Burgdorf and Others*, C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135).

23 However, in order to find that the national law constitutes an incorrect implementation of Article 98(1) to (3) of the VAT Directive, it must first be established that the decisive factor in determining whether the reduced rate of VAT of 5% is applicable is that, as is argued by the tax authorities, the services in question are not classified under the PKWiU grouping 10.85.1.

24 Conversely, rejection of the tax authorities' position makes it possible to verify if in the case at hand it is relevant whether it is a 'restaurant service' within the meaning of Article 6 of Regulation No 282/2011 which is at issue.

25 If the position of the tax authorities and of the court of first instance that statistical classifications are the decisive factor in determining the appropriate rate applicable to the appellant's sales of prepared dishes is called in question, this means that the classification of such services as 'restaurant services' or their exclusion from the scope of that category is crucially significant.

26 In that context, the conditions under which those prepared dishes are served are of primary importance. Those conditions differ as a result of the different sales systems used by the appellant to conduct transactions.

27 When selling on the premises, the appellant makes available to the buyer the infrastructure that enables him or her to consume the purchased meal on site, there is no specialised waiter service, the ordering process is simplified and partly automated, and the customer's ability to customise the order is limited.

28 All the circumstances on which the tax authorities and the court of first instance have focused obtain only when the appellant sells his goods directly on the premises. However, several sales systems are used: on the premises, 'walk-through', 'drive-in', and 'food court'.

29 The 'drive-in'/'walk-through' sales system involves the sale of food products to customers who drive up in their cars to a counter outside the sales establishment (drive-in) or to those who walk up to a separate counter (window), which is also situated outside the sales establishment (walk-through).

30 This system is targeted at customers who, for objective reasons (mainly to do with having little time), do not expect the appellant to provide them with any infrastructure. Their expectations are limited to receiving a prepared dish which they can consume outside the premises.

31 By contrast, a 'food court' is a sales system used in shopping centres which consists in selling defined products to customers in special zones designated for that purpose. 'Boxes' — stands run by operators offering food products — are located within these zones. Within these boxes, each operator has at his or her disposal a checkout/sales area, a kitchen area, in some cases also a storage area, and a dining area — a common area where the customers of those operators may consume their meals. The customer receives a ready-made fast-food meal in

disposable packaging, which he or she can take away or eat in the dining area. There are no other restaurant facilities and there is no cloakroom.

32 Therefore, in the ‘drive-in’, ‘walk-through’ and ‘food court’ systems, the customer is potentially able to use the infrastructure offered, but for the average customer this element does not appear to constitute an essential part of the service provided — in contrast to sales in restaurants.

33 Furthermore, there is the question whether the way in which the dishes are prepared, consisting in, in particular, the heating of certain semi-finished products and the composing of prepared dishes from semi-finished products, is relevant.

34 It should be pointed out that the appellant makes a valid argument that in his sales systems the waiting time for products is meant to be as short as possible and does not exceed a few minutes in practice. This quick provision of products is possible because their preparation is limited to basic standard actions and for the most part takes place in a continuous and regular fashion according to demand that is generally foreseeable (no specialist catering staff work at the appellant’s establishments); the products offered by the appellant are placed in packaging that enables customers to move around freely with them. The buyer can take the purchased goods in hand, like any other food product, and leave the premises with them without using the establishment’s infrastructure at all. Owing to the nature of the appellant’s activities, no crockery or cutlery is provided.

35 In the view of the referring court, it appears in the light of the case-law of the Court of Justice that the preparation of a hot product which is ready for consumption cannot in itself characterise the transaction in question as a supply of services (see, in particular, judgment of 10 March 2011, *Finanzamt Burgdorf and Others*, C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraphs 68 and 89).

36 The referring court also wishes to emphasise that each of the ways in which the appellant sells prepared dishes contains elements of both a supply of goods and a supply of services. The only differences are the extent of the infrastructure offered and the customers’ expectations as to the range of service elements. In the view of the referring court, the sale of prepared dishes on the premises involves the largest share of service elements and the ‘drive-in’/‘walk-through’ sales system involves the smallest share. However, irrespective of the type of sales system under examination, the service element (including the option of consuming the purchased meal on the premises) is only of a potential nature and is dependent on the choice made by the customer. Owing to the simplified sales system and the way in which the purchased dishes are served and packaged, it is not possible to determine (at the sales stage) whether the dish being sold will be consumed on the premises or is being purchased ‘to take away’. This makes it difficult to correctly assess whether (and if so, whether this applies to all the sales systems operated by the appellant) the service element is of sufficient importance to justify the conclusion that the transaction at issue must be treated as a supply of services.

37 The referring court also has additional doubts arising from the fact that the criteria for distinguishing between a supply of goods and a supply of services in the context of the supply of prepared meals and beverages were introduced by the Court of Justice in its judgment of 2 May 1996, *Faaborg-Gelting Linien*, C-231/94, EU:C:1996:184, which was delivered prior to the introduction of the EU definition of restaurant and catering services (Article 6 of Regulation No 282/2011). Therefore, it is doubtful whether those criteria likewise remain valid for the purposes of assessing whether a restaurant service is at issue in the present case. In the opinion of the referring court, a modification of the views expressed by the Court of Justice in the aforementioned judgment may be warranted, inter alia, by the fact that if the transaction at issue is recognised as being a restaurant service, a reduced rate of VAT will be applicable to it and, according to the settled case-law of the Court of Justice, in matters of VAT, provisions which are in the nature of exceptions to a principle must be interpreted strictly, while ensuring that the exception is not deprived of its effectiveness (see, inter alia, judgments of 30 September 2010, *EMI Group Ltd*, C-581/08, EU:C:2010:559, and of 20 October 2010, *Commissioners* v *AXA UK*, C-175/09, EU:C:2010:646).