Case C-488/18

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:

25 July 2018

Referring court or tribunal:

Bundesfinanzhof (Germany)

Date of the decision to refer:

21 June 2018

Applicant, and Respondent in the appeal on a point of law:

Golfclub Schloss Igling e. V.

Defendant, and Appellant on a point of law:

Finanzamt Kaufbeuren mit Außenstelle Füssen

Subject matter of the main proceedings

Common system of value added tax — Direct effect of Article 132(1)(m) of Directive 2006/112 — Interpretation of the concept of 'non-profit-making organisation' in that provision

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Does Article 132(1)(m) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, under which Member States are to exempt 'the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education', have direct effect, with the result that, in the

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absence of transposition, that provision may be relied on directly by non-profit-making organisations?

2. If the first question is answered in the affirmative: Is 'non-profit-making organisation' within the meaning of Article 132(1)(m) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

   – a concept that must be interpreted under EU law autonomously, or

   – are the Member States authorised to make the existence of such an organisation subject to conditions such as Paragraph 52, in conjunction with Paragraph 55, of the Abgabenordnung (German General Tax Code) (or Paragraph 51 et seq. of the General Tax Code in their entirety)?

3. If it is a concept that must be interpreted under EU law autonomously: Must a non-profit-making organisation within the meaning of Article 132(1)(m) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax have rules that apply in the event that the organisation is dissolved, under which it has to transfer its existing assets to another non-profit-making organisation in order to promote sport and physical education?

Provisions of EU law cited

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, in particular Article 13A

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 2(1) and Articles 132 to 135

Provisions of national legislation cited

Abgabenordnung (General Tax Code; 'the AO'), in particular Paragraph 51 et seq.

Brief summary of the facts and procedure

1 The applicant is a registered association, which was not recognised as charitable within the meaning of Paragraph 51 et seq. of the AO in the year at issue (2011). According to its articles of association, the purpose of the association is to nurture and promote the sport of golf. This purpose is pursued via the operation of a golf course and the associated facilities.

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2 In the year at issue, the applicant provided, inter alia, a series of services which come within the scope of VAT within the meaning of Article 2(1)(c) of Directive 2006/112 and which are the subject of dispute as to whether they can be exempt from tax pursuant to Article 132(1)(m) of that directive. Those services relate to the entitlement to use the golf course (green fee), the rental of golf balls, the holding of golf tournaments and events for which the applicant received entry fees for participation, caddie hire and the sale of a golf club.

3 The defendant Finanzamt (tax office) considered the aforementioned services to be subject to VAT. The Finanzgericht (Finance Court) allowed the action brought against the tax office on the ground that the applicant was a non-profit-making organisation that could rely on Article 132(1)(m) of Directive 2006/112 for exemption from tax for the transactions at issue. The tax office's appeal on a point of law challenges that decision.

Brief summary of the basis for the reference

Preliminary remarks

4 Under national law, only entry fees can be exempt from tax. The tax office also denied tax exemption in respect of these, however, as the applicant is not a charitable organisation within the meaning of Paragraph 51 et seq. of the AO.

5 Under EU law, all of the services at issue may be exempt from tax pursuant to Article 132(1)(m) of Directive 2006/112, with the exception of the sale of a golf club. This has already been held by the Court of Justice with regard to green fees (see the judgment of 19 December 2013, *Bridport and West Dorset Golf Club*, C-495/12, EU:C:2013:861, paragraphs 30 and 32). For these services, the questions material to the decision in the case in dispute therefore arise as to whether Article 132(1)(m) has direct effect (first question of law) and what meaning is to be attached to the concept of a non-profit-making organisation in that provision (second and third questions of law).

6 The referring court takes the view that Article 133(a) and Article 134 of Directive 2006/112 do not preclude this.

7 In relation to Article 133(a) of Directive 2006/112 (previously the first indent of Article 13A(2)(a) of Directive 77/388), the Court of Justice has ruled that the prohibition of systematically making a profit is to be interpreted in the same way as the concept of a non-profit-making organisation in Article 132(1)(m) of Directive 2006/112 (Article 13A(1)(m) of Directive 77/388) (judgment of 21 March 2002, *Kennemer Golf*, C-174/00, EU:C:2002:200, paragraph 35).

8 In relation to Article 134 of Directive 2006/112, the Court of Justice has ruled that that provision does not exclude from the exemption in Article 132(1)(m) of Directive 2006/112 a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the

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right to use that golf course to visiting non-members of that body (judgment of 19 December 2013, *Bridport and West Dorset Golf Club*, C-495/12, EU:C:2013:861, paragraph 32).

The first question of law

9 In view of the judgment of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117), it is doubtful whether Article 132(1)(m) of Directive 2006/112 has direct effect, so that in the absence of transposition that provision may be relied on directly by non-profit-making organisations.

10 In that judgment, the Court of Justice ruled that Article 13A(1)(n) of Directive 77/388, exempting 'certain cultural services' from VAT, had to be interpreted as not being of direct effect, with the result that, in the absence of transposition, that provision could not be relied on directly by a body governed by public law or other cultural body recognised by the Member State concerned supplying cultural services.

11 The Court of Justice based this finding on the ground that, by referring to 'certain cultural services', Article 13A(1)(n) of Directive 77/388 does not require the exemption of all cultural services, with the result that the Member States may exempt 'certain' of them while subjecting others to VAT. In so far as that provision allows the Member States a discretion in determining the exempted cultural services, it does not satisfy the conditions for being capable of being relied on directly before the national courts (judgment of 15 February 2017, *British Film Institute*, C-592/15, EU:C:2017:117, paragraphs 23 and 24).

12 The fact that the EU legislature clearly did not wish to oblige the Member States to exempt the supply of all services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education could militate against a direct effect of Article 132(1)(m) of Directive 2006/112. However, this would ultimately be the position if it were to be found that the provision has direct effect.

The second question of law

13 In relation to the second question, the referring court assumes that — owing to the lack of authorisation to determine a definition, such as that granted to them by virtue of Article 135(1)(g) of Directive 2006/112, for instance — Article 132(1)(m) of Directive 2006/112 does not permit the Member States to define the concept of non-profit-making organisation independently. Accordingly, it is not possible for this concept to be interpreted in accordance with either Paragraph 52, in conjunction with Paragraph 55, of the AO (in which the concept of charitable purposes and the concept of altruism, which is part of the definition of the former concept, are defined) or Paragraph 51 et seq. of the AO in their entirety (that is to say, all of the provisions which determine when a body pursues purposes that are granted tax reductions, in particular charitable purposes). In this

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regard, the Bundesfinanzhof (Federal Finance Court) has already ruled that the tax exemptions pursuant to Article 13 of Directive 77/388 are autonomous concepts under EU law that are intended to avoid a situation in which the implementation of the system of value added tax varies from one Member State to another.

The third question of law

14 The third question arises if Article 132(1)(m) of Directive 2006/112 has direct effect and the Member States are not permitted to define the concept of a non-profit-making organisation. In such a case, clarification is required as to which requirements are to be imposed on this concept under EU law.

15 In this respect, it is important to ascertain whether a non-profit-making organisation requires that the use of its assets for the purpose facilitated by Article 132(1)(m) of Directive 2006/112 will also be safeguarded in the event that the organisation is dissolved, with the result that, even then, financial advantages do not arise for the members (in this respect, see., in general terms, judgment of 21 March 2002, *Kennemer Golf*, C-174/00, EU:C:2002:200, paragraph 33).

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