Case C-516/21

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:

20 August 2021

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

26 May 2021

Defendant and appellant on a point of law:

Finanzamt X

Applicant and respondent in the appeal on a point of law:

Y

Subject matter of the main proceedings

Directive 2006/112/EC – Article 135 – Extension of the tax exemption for the letting and leasing of immovable property to the letting or leasing of a building together with the equipment and machinery permanently installed therein

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Does the tax liability for the leasing of permanently installed equipment and machinery pursuant to Article 135(2), first subparagraph, point (c) of Directive 2006/112/EC (‘the VAT Directive’) cover

– only the isolated (independent) leasing of such equipment and machinery or also

– the leasing (letting) of such equipment and machinery which is exempt by virtue of (and as a supply ancillary to) a letting of a building, effected between the same parties, pursuant to Article 135(1)(l) of the VAT Directive?

Provisions of European Union law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, specifically Article 135

Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC, as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services, specifically Article 13b(d)

Provisions of national law relied on

Umsatzsteuergesetz (Law on value added tax; 'the UStG'), specifically point 12 of Paragraph 4

Succinct presentation of the facts and procedure in the main proceedings

1 In the years 2010 to 2014 (years at issue), the applicant leased turkey rearing sheds together with permanently installed equipment and machinery for feeding, heating, ventilation and lighting. He assumed that his supply, for which a single lump-sum payment was made, was exempt from value added tax (VAT) in its entirety.

2 By contrast, the tax office took the view that, based on the costs incurred by the applicant, 20% of the single lump-sum lease payment is attributable to the equipment and machinery and is therefore subject to VAT. It therefore issued notices of assessment to that effect.

3 The objection raised against those notices was unsuccessful. The Finanzgericht (Finance Court) upheld the action subsequently brought. The tax office has challenged the judgment of that court by way of the appeal on points of law which is before the referring court.

Succinct presentation of the reasoning in the request for a preliminary ruling

Legal framework

4 Under Article 135(1)(l) of Directive 2006/112/EC, the leasing or letting of immovable property is exempt. Amongst other things, 'the letting of permanently installed equipment and machinery' is excluded from that exemption, under

Article 135(2), first subparagraph, point (c). Under the second subparagraph of Article 135(2), Member States may apply further exclusions to the scope of the exemption.

5 In line with Directive 2006/112/EC, national law provides that the leasing or letting of immovable property is exempt (first sentence of point 12 of Paragraph 4 of the UStG). Amongst other things, the leasing and letting of machines and other equipment of any kind which are part of an operating plant are not exempt (second sentence of point 12 of Paragraph 4 of the UStG).

The question referred

6 The question referred to the Court on the interpretation of Article 135(2), first subparagraph, point (c) of Directive 2006/112/EC is raised under three conditions.

7 First, the letting of the building together with the equipment and machinery permanently installed therein must, as a whole, meet the conditions for exemption laid down in Article 135(1)(l) of Directive 2006/112/EC.

8 On the one hand, that exemption covers the leasing or letting of a building, such as the animal shed in the present case (judgment of 16 January 2003, *Maierhofer*, C-315/00, EU:C:2003:23, paragraphs 35 and 40).

9 On the other hand, the letting of the installed equipment and machinery is also exempt under Article 135(1)(l) of Directive 2006/112/EC. This follows from the judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraphs 39 and 41). According to that judgment, Article 135(1)(l) of Directive 2006/112/EC must be interpreted as meaning 'that a lease contract for an immovable property which was used for commercial purposes and for all capital equipment and inventory items necessary for that use constitutes a single supply in which the letting of the immovable property is the principal supply.' That interpretation is confirmed by Article 13b(d) of Implementing Regulation No 282/2011 (which, however, entered into force only after the years at issue). According to that provision, 'any item, equipment or machine permanently installed in a building or construction which cannot be moved without … altering the building or construction' is also to be regarded as immovable property. Lastly, it should be noted that the objects permanently installed in the animal shed are fundamental elements of immovable property under national civil law.

10 Second, the exception to the exemption in Article 135(2), first subparagraph, point (c) of Directive 2006/112/EC must in principle apply to the letting of equipment and machinery. The referring court proceeds on the assumption that, for the purposes of interpreting that provision, no distinction is to be made between the leasing and letting of equipment and machinery. In that respect, it relies on the judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038), in which the Court found that the letting in that case was exempt, without distinguishing it from leasing. Furthermore, the Court has defined letting which is exempted under

Article 135(1)(l) of Directive 2006/112/EC as meaning that the landlord of property must have assigned to the tenant, in return for rent and for an agreed period, the right to occupy his or her property and to exclude other persons from it (judgment of 22 January 2015, *Régie communale autonome du stade Luc Varenne*, C-55/14, EU:C:2015:29, paragraph 22). The fact that, under national law, letting additionally confers the right to enjoy the fruits of the property concerned does not in any way change the exemption, as shown by the example of the exempt letting of land for agricultural use.

11 Even if Article 135(2), first subparagraph, point (c) of Directive 2006/112/EC were to cover only the case of leasing, and not that of letting, tax liability for the letting of equipment and machinery would otherwise result from national law (second sentence of point 12 of Paragraph 4 of the UStG).

12 Third, there must be a single transaction. In that regard, the Court recently ruled, in the judgment of 4 March 2021, *Frenetikexito* (C-581/19, EU:C:2021:167, paragraph 37 et seq.), referring to earlier case-law, that where an economic transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether it gives rise to one or more supplies, given that, as a general rule, each supply must be regarded as a distinct and independent supply.

13 However, by way of exception to that general rule, a transaction should not be artificially split. This is why there is a single supply where several elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

14 Furthermore, an economic transaction constitutes a single supply where one or more elements are to be regarded as constituting the principal supply, while, by contrast, other elements are to be regarded as one or more ancillary supplies which share the tax treatment of the principal supply.

15 On the basis of the abovementioned principles from the case-law, the Finance Court ruled that the making available for use of equipment and machinery was a supply ancillary to the making available for use of the building. By way of reasoning, it stated that such equipment and machinery were specially adapted fittings that served solely to enable the turkey shed to be used in accordance with the contract, under optimal conditions.

16 The referring court has doubts as to whether the single supply approach takes precedence or whether a splitting requirement whereby single transactions are to be split into an exempt part and a taxable part can be derived from Article 135(2), first subparagraph, point (c) of Directive 2006/112/EC.

17 The case-law of the Court on Article 135(2), first subparagraph, point (b) of Directive 2006/112/EC militates in favour viewing the transaction as a single supply. In that regard, the Court ruled that the letting of premises and sites for

parking vehicles ‘cannot be excluded from the exemption in favour of the “leasing or letting of immovable property” if they are closely linked to lettings of immovable property for another purpose which are themselves exempt from value-added tax’ (judgment of 13 July 1989, *Henriksen*, C-173/88, EU:C:1989:329, paragraph 17). In that respect, it proceeded on the basis that the letting of immovable property and the letting of premises and sites for parking vehicles constitute a ‘single economic transaction’.

18 In accordance with the case-law, in the case of the leasing or letting of a building containing inventory which does not constitute permanently installed equipment and machinery, the exemption also covers that inventory (see judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038).

19 The judgment of 18 January 2018 in *Stadion Amsterdam* (C-463/16, EU:C:2018:22) might also militate in favour of the single supply approach taking precedence. According to that judgment, a single supply comprised of two distinct elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different rates of tax, must be taxed solely at the rate of value added tax applicable to that single supply.

20 On the other hand, the fact that the letting of equipment and machinery is inconsistent with the passive nature of leasing could militate in favour of a split. In that regard, the referring court infers from the case-law of the Court of Justice that the leasing of immovable property is of a ‘passive nature’ and that the exemption for the leasing or letting of immovable property does not apply to the making available for use of machinery and equipment which entails not only the passive activity of making a property available but also a large number of commercial activities of the owner, such as supervision, management and continuing maintenance and the provision of other facilities, with the result that, in the absence of quite exceptional circumstances, letting out that property cannot therefore constitute the main service supplied (judgment of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö*, C-215/19, EU:C:2020:518, paragraph 43).

21 The judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038) does not provide any clarification with regard to the question referred. It is true that, in that judgment (paragraph 39), in relation to property which, although movable, is incorporated in the immovable property as an integral part of that property, the Court assumed a supply ancillary to an exempt letting of immovable property. Although the question as to the application of Article 135(2), first subparagraph, point (c) of Directive 2006/112/EC and as to a resulting tax liability may arise on that basis, the Court did not take a position on that issue in that judgment.