Case C-108/22

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:

16 February 2022

Referring court

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

26 August 2021

Applicant:

C. sp. z o.o. (currently in liquidation)

Defendant:

Dyrektor Krajowej Informacji Skarbowej

Subject matter of the main proceedings

The possibility of applying the special VAT margin scheme laid down in Article 119 of the Law on VAT to the resale by the applicant of accommodation services, not supplemented by ancillary services, purchased beforehand in its own name from other taxable persons.

Subject matter and legal basis of the request

Application of Article 306 [of Directive 2006/112/EC] to a hotel services consolidator.

Question referred for a preliminary ruling

‘Must Article 306 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax […] be interpreted as being applicable to a taxable person who is a hotel services consolidator and who purchases

accommodation services and resells them to other economic operators, in cases where those transactions are not accompanied by any other ancillary services?'

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Articles 306, 307, 308, 309 and 310.

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): Article 119.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant, which is an active taxable person for the purposes of VAT, operates as a so-called 'hotel services consolidator'. As part of its economic activity, the company offers the possibility of booking accommodation facilities in hotels and other establishments with a similar function located in the territory of Poland and abroad. Since the company does not have its own accommodation capacity, it purchases accommodation services in its own name and on its own behalf from other taxable persons, which are then resold by the company to its customers. The company's customers are economic operators. The company does not sell accommodation to so-called 'retail customers'. Depending on its customers' needs and expectations, the company also provides customers with advice on the choice of accommodation and help with travel arrangements. Most often, however, when booking and reselling accommodation services the company does not provide the customer with ancillary services in the form of travel information services or travel advice. In that case, the customer concerned is involved solely in the purchase of accommodation services. The price at which the company resells individual accommodation services includes the cost of purchasing the accommodation service and the company's profit in the form of a transaction fee for making the booking.

2 The applicant submitted the following question to the Dyrektor Krajowej Informacji Skarbowej (Director of the National Tax Information Service):

'Is the resale by the company of accommodation services, not supplemented by ancillary services, purchased beforehand in its own name and on its own behalf from other taxable persons, subject to VAT as a tourist service under the special VAT margin scheme laid down in Article 119 of the Law on the tax on goods and services?'

3 In the view of the applicant, the answer to that question should be in the affirmative.

4 In an individual interpretation of 27 April 2017, the Director of the National Tax Information Service found that the applicant's position was incorrect. In the view of that authority, a hotel service including accommodation, and possibly breakfast, does not constitute a tourist service because it does not involve a complex service made up of a number of services.

5 The applicant lodged an appeal against the above individual interpretation with the court of first instance, which ruled that the appeal was well founded. In its view, the resale of accommodation services comes within a broader category of tourism services and is therefore taxable under the special VAT margin scheme.

6 The tax authority lodged an appeal on a point of law against the above judgment with the referring court [the Naczelny Sąd Administracyjny (Supreme Administrative Court)].

The essential arguments of the parties in the main proceedings

7 The Director of the National Tax Information Service stated that a tourist service is a complex service supplied to travellers which includes partial services without which a particular tourism event could not take place and therefore, in the view of the authority, organised or individual leisure trips associated with recreation and entertainment ('a complex programme of events') should be regarded as tourist services. In that regard, the authority noted that the catalogue of services making up a tourist service provided by an organiser is open in nature and a specific act, in order to be regarded as a service, should be designed to meet a specific need of the ordering party. In the view of the authority, the purchase of those goods and services, which meets the needs and expectations of a traveller, will, in the case of the supply of tourist services, constitute an element in the calculation of the margin.

8 The authority takes the view that a tourist service, as referred to in Article 119 of the Law on VAT, is a service made up of a number of external and internal services, such as, for example, hotel accommodation, meals, and transport, which are designed to organise a customer's stay away from his or her place of residence and closely linked, thus forming a whole from an economic point of view. Therefore, in the view of the authority, organised or individual leisure trips associated with recreation and entertainment (a complex programme of events) must be regarded as tourist services. The authority considered that the statutory definition of tourist services includes, inter alia, hotel services. That authority therefore concluded that, in order for a particular service to be regarded as a tourist service, it must be a service consisting of more than one service, which was not so in the present case.

9 The court of first instance, concurring with the applicant's position, stated that the taxation of tourist services is set out in Article 119 of the Law on VAT. That provision constitutes implementation of Article 306 of Directive 2006/112/EC. Those provisions provide for the obligatory application of the VAT margin

scheme to tourist services. Application of that scheme rules out the possibility of deducting input tax on the services purchased for the direct benefit of the traveller which make up the tourist service.

At the same time, that court noted that there is a view in national case-law and academic writings that in practice hotel services are regarded as tourist services which can be subject to the VAT margin scheme, even where they are provided without ancillary services connected with the organisation of leisure time.

In the view of the court of first instance, in interpreting the expression 'tourist services' it is also legitimate to refer to the principles of linguistic interpretation and also, in order to consolidate the outcome thereof, to apply a schematic interpretation. In that context, it pointed out that, according to the definition of 'turystyka' (tourism) in the Słownik języka polskiego (Dictionary of the Polish language), it must be understood as meaning organised collective or individual journeys away from a fixed residence, tours of foreign parts having sightseeing purposes or being a form of active leisure. Therefore, since the purpose of an accommodation service is to meet the basic everyday requirements of persons temporarily away from their fixed residence, the supply of that service constitutes a form of supply of tourist services.

10 For those reasons, the court of first instance shared the applicant's view that, in the circumstances described in the request for an interpretation, the hotel services sold by the company will, as an independent service, be taxed under the VAT margin scheme.

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

11 The referring court points out that the essence of the dispute in the present case concerns the determination of whether, for the purposes of the legal classification of a particular service as a tourist service, which, under Article 119(1) of the Law on VAT, is subject to the special VAT margin scheme, it is necessary to satisfy the requirement relating to complexity, and consequently whether an accommodation service purchased from other taxable persons in a person's own name and on its own behalf, and not supplemented by ancillary services, can constitute a tourist service.

12 The answer to the above question essentially involves determining the correct interpretation of Article 119(1) of the Law on VAT, under which the taxable amount in respect of the provision of tourist services is to be the amount of the margin, reduced by the amount of tax due, without prejudice to paragraph 5. Under Article 119(2) of that law, the 'margin' referred to in paragraph 1 is to mean the difference between the amount to be paid by the purchaser of the service and the cost of the purchase by the taxable person of goods and services from other taxable persons for the direct benefit of the traveller; 'services for the direct benefit of the traveller' is to mean services forming part of the tourist services provided and, in particular, transport, accommodation, meals and insurance.

Article 119(3) provides that paragraph 1 is to apply regardless of who purchases the tourist services where the taxable person: – acts for the purchaser of the service in his/her own name and on his/her own behalf; – in respect of the supply of a service, purchases goods and services from other taxable persons for the direct benefit of the traveller.

13 Cumulative satisfaction of all of the abovementioned conditions determines whether or not application of the special VAT margin scheme to tourist services is obligatory. In order for a service supplied by the taxable person to be taxable under the margin scheme, the taxable person must, when supplying that service, act for the customer in his/her own name and on his/her own behalf and purchase goods and services for the direct benefit of the traveller from a taxable person for the purpose of tax on goods and services.

14 The referring court notes that the Law on goods and services does not contain a definition of the expression ‘tourist service’. Consequently, in order to determine the scope of the services taxed under the margin scheme, it is legitimate to refer to Article 306 of Directive 2006/112/EC (previously – Article 26 of 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; ‘the Sixth Directive’), which contains the rules laid down in Article 119(1) and (2) of the Law on VAT concerning the taxation of tourist services.

15 Article 306(1) of Directive 2006/112/EC requires Member States to apply a special VAT scheme to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

16 It should be noted that, whereas the term ‘usługi turystyczne’ (travel services) is used in [the Polish-language version of] Article 26 of the Sixth Directive, that term no longer appears in [the Polish-language version of] Article 306 et seq. of Directive 2006/112/EC. However, both provisions refer to services provided by travel agents and tour operators. The [Polish-language version of the] Sixth Directive defines Article 26 as a ‘specjalny system dla biur podróży’ (special scheme for travel agents), whilst Chapter 3 [of Title XII] of [the Polish-language version of] Directive 2006/112/EC is entitled ‘procedura szczególna dla biur podróży’ (special scheme for travel agents). Thus, both directives apply the margin scheme to persons providing specific services.

17 The referring court notes that, in order to determine whether a single complex transaction should be classified as a supply of goods or as a supply of services, it is necessary to identify its predominant elements.

18 This position is supported by the judgments of the Court of Justice of 22 October 1998 in Joined Cases C-308/96 and C-94/97, *Madgett and Baldwin* [EU:C:1998:496] and of 19 June 2003 in Case C-149/01, *First Choice Holidays*

[EU:C:2003:358] (delivered in the context of the directive previously in force), according to which, in the case of complex services consisting of several acts, all those acts or services constitute a single supply for the purposes of VAT, provided that they form, from an economic point of view, a whole, which it would be artificial to split.

19 It is apparent from the abovementioned judgments of the Court of Justice that, in each case where there is uncertainty as to whether a particular transaction consisting of a set of services and acts should be regarded as a supply or as a service, a case-by-case assessment must be made, examining the specific circumstances of the case at issue.

20 In its judgment in Joined Cases C-308/96 and C-94/97, the Court of Justice also pointed out that a hotelier cannot be automatically regarded as providing tourist services if he/she offers only a hotel service and not a complex service, one of the elements of which is accommodation. The Court of Justice also held that Article 26 of the Sixth Directive applies also to persons who, formally speaking, are not travel agents but who offer organised trips in their own name and for that purpose purchase services from other taxable persons.

21 It should be noted that, when deciding on the rules of taxation where, in the conditions described in Article 119 of the Law on VAT, they allow travellers to purchase a hotel service not bundled with other services, particular relevance attaches to the judgment of the Court of Justice of the European Union of 26 September 2013 in Case C-193/11, *Commission* v *Poland* [EU:C:2013:608]. In that judgment, the Court of Justice explained that the margin scheme serves to distribute the revenues from collection of that tax fairly between the Member States. With reference to Article 307 of Directive 2006/112/EC, the Court of Justice stressed that transactions carried out under the conditions laid down in Article 306 by travel agents in relation to travel are to be regarded as a single service supplied by a travel agent to a traveller. A single service is taxable in the Member State in which the travel agent has a fixed establishment from which the service is supplied. The Member State in which a particular service (for example, one provided by a hotelier) is consumed obtains VAT revenue from it, whereas the revenue from the margin of the travel agent which sells that services to a traveller is obtained by the State in which the travel agent has its fixed establishment.

22 That issue should also be assessed in the light of the judgment of the Court of Justice of 19 December 2018 in Case C-552/17, *Alpenchalets Resorts GmbH* [EU:C:2018:1032], which demonstrates the need to tax tourist services under the VAT margin scheme.

23 The referring court states that, within the framework of the fundamental principle of VAT set out in Article 168 of the VAT Directive, which is the principle of neutrality, it is not permissible for certain services to be taxed in accordance with general rules, whereas competing services are taxed through application of the

simplified margin method. This could thus give rise to an infringement of the principle of neutrality in which the resale of accommodation services without ancillary services would be taxed in accordance with general rules, whereas the resale of the same accommodation service supplemented by an ancillary service would benefit from application of the simplified VAT margin method.

24 Obtaining the views of the Court of Justice on the application of Article 306 of Directive 2006/112/EC, within the scope of the question referred, will make it possible to dispel the uncertainty as to the application of the special VAT margin scheme in respect of hotel services in cases where the transactions concerned are not accompanied by ancillary services.