Case C-288/19

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:

9 April 2019

Referring court:

Finanzgericht des Saarlandes (Germany)

Date of the decision to refer:

18 March 2019

Applicant:

QM

Defendant:

Finanzamt Saarbrücken

Subject matter of the main proceedings

Fixing of turnover tax for 2013 and 2014 on the provision of company cars

Subject-matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred

Is Article 56(2) of the VAT Directive to be interpreted as meaning that 'hiring of a means of transport to a non-taxable person' should also be understood as referring to the provision of a vehicle (company car) forming part of the assets of the business of a taxable person to his staff, if the employee does not provide consideration for it that does not consist in (part of) the work performed by him, and thus does not make any payment, does not use any of his cash remuneration for it, and also does not choose between various benefits offered by the taxable

person under an agreement between the parties according to which the entitlement to use the company car is contingent on the forgoing of other benefits?

Provisions of EU law cited

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 by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11) ('the VAT Directive'), specifically Articles 2, 24, 26, 45, 56.

Provisions of national law cited

Umsatzsteuergesetz (Law on turnover tax, 'the UStG'), specifically Paragraphs 1, 3, 3a, 3f

Brief summary of the facts and procedure

1 The applicant is a public limited liability company incorporated in Luxembourg (S.A.), whose registered office is located in the Grand Duchy of Luxembourg. It provides two of its employees who work in its company in Luxembourg and have their permanent address in Germany with a company car forming part of the assets of its business, including for private journeys. During the years at issue, it received from one of the two employees a contribution towards the costs of the company car provided to him, which was deducted from his remuneration. The applicant is registered in the so-called 'simplified tax scheme' in Luxembourg, in which no input tax can be claimed. Therefore, it did not claim any input tax for the costs relating to the two company cars; in turn, the provision of the vehicles to the employees was also not taxed via the simplified tax scheme in Luxembourg.

2 In November 2014 the applicant registered itself as a VAT payer with the defendant tax office due to the provision of the vehicles in Germany. In its VAT declarations for the years at issue, the applicant reported for this provision of vehicles from 2013 other services taxable at 19% in the amount of EUR 7 904 (2013) and EUR 20 767 (2014) and the VAT payable thereon. The applicant raised an objection to the VAT assessments for both years, which was rejected as unfounded by the defendant.

3 With its action, the applicant requests that the VAT for 2013 and 2014 be fixed at EUR 0.

Principal arguments of the parties in the main proceedings

4 The applicant takes the view that the requirements for levying VAT on the provision of company cars in Germany had not been met.

5 The company cars were not provided for consideration within the meaning of the provisions of EU law, as the members of staff neither made a payment nor had to give up part of their cash remuneration. The sole fact that the employees worked for the employer and, for income tax purposes, the use was taxable as income did not constitute use for consideration.

6 Nor could a hiring service be assumed. According to the current case-law of the Court of Justice, making company assets available for private purposes without requiring from the beneficiary a rental fee to be paid in cash was not to be regarded as tax-exempt hiring, but rather as a benefit in kind pursuant to Article 26(1)(a) of the VAT Directive. Under civil law also, the provision of a company car was to be assessed under labour law, and not under rent law. According to the case-law of the Bundesfinanzhof (Federal Finance Court, 'the BFH'), the provision of a company car was an integral component of the remuneration of management staff. The view taken by the defendant was precluded by the almost unanimous view taken by the VAT Committee in its guidelines resulting from the 101st meeting of 20 October 2014.

7 The defendant requests that the action be dismissed as unfounded.

8 It stated that the provision of the company cars to employees was to be classified as a service provided for consideration in the form of long-term hiring out of means of transport. According to the requirements laid down by the Federal Ministry of Finance (BMF) in the Umsatzsteueranwendungserlass (Decree on the application of turnover tax) and the relevant BMF letter, the provision of a vehicle by a trader to his staff for private use would fall in the category of other services provided for consideration, with the consideration generally consisting in part of the work performed by the employee for the private use of the vehicle. This was always the case when the vehicle — as in the present case — was provided to the employer for a certain duration and not only occasionally for private use. According to the guidelines of the VAT Committee of 20 October 2014, it was not a question of whether the service was provided for consideration or for no consideration. The fact that the Grand Duchy of Luxembourg did not agree with the adopted guidelines, assumed that the provision of a vehicle constituted a service supplied for no consideration and taxed it at the place of the trader supplying the service, therefore in Luxembourg, contradicted the view taken by the majority of the VAT Committee.

Brief summary of the basis for the reference

9 The decision in the dispute hinges on how Article 56(2) of the VAT Directive is to be interpreted. The reason for this is that, if 'hiring of a means of transport to a non-taxable person' within the meaning of the directive should also be understood as referring to the provision of a vehicle (company car) forming part of the assets of the business of a taxable person to his staff without the latter providing consideration that does not consist of (part) of the work performed by him, for

hiring that is not short-term the place of supply of the service is determined by the member of staff's permanent address, which is located in the Federal Republic of Germany in the present dispute.

10 If, however, that provision of a company car is not to be regarded as hiring of a means of transport within the meaning of Article 56(2) of the VAT Directive, in accordance with the applicable EU law it would be provided — either as a service supplied for consideration within the meaning of Article 2(1)(c) of the VAT Directive to a non-taxable person or else as a service treated as a supply of services for consideration under Article 26(1)(a) of the VAT Directive — at the place where the supplier has established his business, therefore Luxembourg in the present case, meaning that tax should not be levied by the defendant.

11 Regarding the question of the uniform treatment of the place of supply of services that consist in the use of goods forming part of the assets of a business for the private use of the staff (therefore including the provision of a company car), the VAT Committee adopted guidelines resulting from its 101st meeting of 20 October 2014 (Document H — taxud.c.1(2015)721834-832 and taxud.c.1(2016)1136484-832 REV, 'the VAT Committee guidelines'). These are not understood in the same way by the Grand Duchy of Luxembourg and the Federal Republic of Germany; unlike Germany, Luxembourg does not see the provision of a vehicle, such as that underlying the present dispute, as a hiring service for consideration, but rather a service to be treated as a supply of services for consideration in accordance with Article 26(1)(a) of the VAT Directive, for which, in accordance with Article 45 of the VAT Directive, the place is determined by the place where the supplier has established his business (Luxembourg).

12 The Chamber takes the view that this question referred should be answered in the negative.

13 The levying of VAT on the provision of company cars in Germany can take place only in accordance with the provisions of the third sentence of Paragraph 3a(3)(2) of the UStG. With the introduction of this provision, the German legislature transposed Article 56(2) of the VAT Directive, which was amended with effect from 1 January 2013, into national law. In accordance with that provision, a hiring service for a means of transport is supplied at the place where the recipient, who is neither a trader nor a legal person to whom a value added tax identification number has been issued, has his permanent address.

14 The Chamber takes the view that, under Article 56 of the VAT Directive and the corresponding third sentence of Paragraph 3a(3)(2) of the UStG, the place of supply of the service can be in Germany only if the hiring service is supplied for consideration. This is doubtful.

15 In order to proceed on the basis of a service supplied for consideration, the staff would have had to have provided consideration for the provision of the car in the

present dispute. However, the Senate has doubts here with regard to the applicant's employee who does not pay any separate remuneration detached from his employment income.

16 The German tax administration generally classifies the provision of a company car by a trader to his staff for private use as long-term hiring out of a means of transport and regards the part of the work that the employee performs for the private use as consideration. The reasoning behind this is that the provision of a vehicle for private purposes constitutes a so-called benefit in kind, which, as wages (and therefore as part of the employee's remuneration for work provided), is in principle subject to income tax in the case of an employee.

17 In light of the case-law of the Court of Justice, however, it is possible that a service supplied for consideration is not present here. In its decision in the *Medicom and Maison Patrice Alard* cases (judgment of 18 July 2013, C-210/11 and C-211/11, ECLI:EU:C:2013:479), the Court of Justice stated, in relation to the concept of supply of services effected for consideration, that such a supply requires the existence of a direct link between the service provided and the consideration received, and the absence of such a payment cannot be compensated for by the fact that, for income tax purposes, that private use of goods forming part of the assets of the business is viewed as constituting a benefit in kind and therefore, in some way, as part of the remuneration which the beneficiary has given up by way of consideration for having the goods in question being made available to him.

18 It is different, however, if an amount corresponding to the value of having the goods made available to the employees is deducted from their salary, or if it is certain that part of the work done by the employees can be regarded as consideration for having the goods made available to them (cf. also judgment of 16 October 1997, *Fillibeck*, C-258/95, ECLI:EU:C:1997:491). Thus in the *Astra Zeneca UK* case (judgment of 29 July 2010, C-40/09, ECLI:EU:C:2010:450), for instance, the Court of Justice regarded part of the work performed as consideration.

19 The German tax administration generally regards work performed by staff as consideration for the provision of vehicles for private journeys if this is governed in the employment contract or is based on oral agreements or other circumstances of the employment relationship, provided that the vehicle is provided for a certain duration and not only occasionally for private use. The BFH essentially shared this view.

20 If the employee does not pay anything for the car being made available, does not have to give up part of his cash remuneration and there is also no agreement with a right to choose from various benefits, it would therefore not be possible to assume a service supplied for consideration in the main proceedings. Doubts as to the existence of consideration could also arise from the fact that the price, which is generally determined on a flat-rate basis under German income tax law, cannot

constitute a specifically agreed rental charge within the meaning of the case-law of the Court of Justice.

21 The fact that the decision of the Court of Justice in the *Medicom and Maison Patrice Alard* cases (judgment of 18 July 2013, C-210/11 and C-211/11, ECLI:EU:C:2013:479) was issued in relation to taxation exemption and not in relation to the taxation of turnover does not preclude it from being applicable to the present dispute; the question of whether or not consideration exists should be determined in a uniform manner.

22 Even if it were found that there is no service supplied for consideration here, however, it is still questionable whether the place of provision of the company cars in the main proceedings is not nevertheless located in Germany. The defendant refers to Article 56(2) of the VAT Directive in this respect, and argues that it does not matter whether a service supplied for consideration or no consideration is involved, as long as a hiring service is to be assumed. Were 'hiring' within the meaning of Article 56(2) of the VAT Directive to cover in a uniform manner services supplied for consideration as well as cases in which they are provided for no consideration — for instance, a supply treated as a supply of services for consideration in the form of the use of goods forming part of the assets of a business in accordance with Article 26(1)(a) of the VAT Directive — the place of supply of the service in the present dispute would likewise be in Germany. In support of its view, the German tax administration once again refers to the guidelines of the VAT Committee, point 3 of which reads:

23 'The VAT Committee by a large majority agrees that as regards the place of supply of services consisting in the use of goods, the rule to apply shall be the same irrespective of whether the service is supplied for consideration or taxed according to Article 26(1)(a) of the VAT Directive.'

24 It is doubtful whether this also applies to hiring services for means of transport. The VAT Directive does not contain specific provisions for determining the place of taxation in the case of services that are supplied for no consideration in the form of the private use of goods forming part of the assets of a business and are to be treated as a supply of services for consideration in accordance with Article 26(1)(a) of the VAT Directive, meaning that it is not absolutely necessary to make a distinction when determining the place of taxation; however, this does not apply to the specific type of service that takes the form of hiring out means of transport, as Article 56(2) of the VAT Directive is applicable to this. The guidelines, according to which cases involving services supplied for consideration are to be treated in the same way as those involving services to be treated as a supply of services for consideration pursuant to Article 26 of the VAT Directive, would be comprehensible only in respect of services for which the place of supply is not separately determined, as is the case in Article 56 of the VAT Directive, for instance.

25 The VAT Committee also appears to regard, in principle, the provision of a company car to staff as an ‘other service’ and appears to make the existence of hiring of a means of transport dependent on the existence of consideration: cf. the aforementioned VAT Committee guidelines, second paragraph of point 3 and last paragraph of point 1.

26 Against this background, the Chamber too takes the view that there are many indications that only a service supplied for consideration can be regarded as a hiring service within the meaning of Article 56(2) of the VAT Directive, which — according to the above statements — appears not to exist in the present case; use of goods forming part of the assets of a business for the private purposes of the staff for no consideration therefore could not be equated to a hiring service.

27 The following aspects also militate against the view that the provision of company cars in a manner such as that underlying the present dispute is to be classified as hiring services within the meaning of Article 56(2) of the VAT Directive:

28 According to the case-law of the Court of Justice, in order for there to be a hiring service, all the conditions characterising that transaction must be satisfied (judgments of 18 July 2013, *Medicom and Maison Patrice Alard*, C-210/11 and C-211/11, ECLI:EU:C:2013:479, and of 29 March 2012, C-436/10, ECLI:EU:C:2012:185). These also include the requirement that a person who hires an object in exchange for the payment of a fee is given the right, for an agreed duration, to take possession of an object and exclude others from it. If part of the work performed by the recipient were to be regarded as consideration, it would be doubtful how the payment of remuneration when an employee is sick would have to be categorised, that is to say, where the employee concerned is not performing any work.

29 The provision of the vehicle is not taking place within the framework of a lease agreement, but rather is governed by labour law. This is because it is connected solely with the staff member’s employment relationship; it is additional compensation for the work performed (even when, according to the case-law of the BFH, the provision of the vehicle is not based on any express agreements). In the main proceedings also, the applicant does not provide anyone else with vehicles; in particular, the object of the enterprise does not consist in the commercial hiring out of means of transport. The provision of a company car is governed in the employment contract or is in line with the benefits that the applicant customarily provides to its staff; there is no separate lease agreement. There is therefore no separate contractual relationship alongside the employment relationship; this is also demonstrated by the fact that the provision of the vehicle comes to an end when the employment relationship comes to an end; it does not continue after that point.