Case C-449/19

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:

13 June 2019

Referring court:

Finanzgericht Baden-Württemberg (Germany)

Date of the decision to refer:

12 September 2018

Applicant:

WEG Tevesstraße

Defendant:

Finanzamt Villingen-Schwenningen

Subject matter of the case in the main proceedings

Legislation of a Member State under which the supply of heat by associations of residential property owners to those owners is exempt from value added tax – Compatibility with the provisions of Directive 2006/112

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) to be interpreted as precluding legislation of a Member State under which the supply of heat by associations of residential property owners to those owners is exempt from value added tax?

Provisions of EU law cited

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

Statement No 1 to the Council's minutes relating to Directive 2006/112

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

Statement No 7 to the Council's minutes relating to the Council meeting of 17 May 1977 concerning Article 13 of Directive 77/388

National legislation cited

Umsatzsteuergesetz (Law on Turnover Tax) (UStG), in particular Paragraph 4.13

Gesetz über das Wohnungseigentum und das Dauerwohnrecht (Wohnungseigentumsgesetz) (Law on the ownership and part-ownership of residential buildings)

Brief summary of the facts and procedure

1 In dispute is the amount of input tax deduction from the acquisition and operating costs of a combined heat and power unit (CHPU) in 2012.

2 The applicant is an association of residential property owners and part-owners consisting of X GmbH, Y (a public authority) and Z (a municipality). In 2012, the applicant constructed a CHPU. It supplied the electricity generated by the CHPU to an energy company and supplied the heat also produced to the residential property owners and/or part-owners.

3 For 2012, the applicant claimed a total of EUR 19 765.17 in input tax resulting from the acquisition and operating costs of the CHPU. The defendant authorised only an amount corresponding to 28% of the input tax deductions claimed, which, according to its calculation, was the proportion of the abovementioned costs attributable to the generation of electricity. It refused the share of 72% of input tax deduction attributable to the generation of heat on the ground that the supply of heat to residential property owners is exempt from tax (Paragraph 4.13 of the UStG).

4 Following an unsuccessful objection, the action challenging that refusal was brought on 13 December 2016 before the referring court, alleging, inter alia, that Paragraph 4.13 of the UStG infringes EU law.

Legal framework

5 According to Paragraph 4.13 of the UStG, inter alia, services which associations of residential property owners supply to such owners and part-owners, within the meaning of the Law on the ownership and part-ownership of residential buildings, are exempt from tax in so far as the services consist in the supply of heat.

6 The rules on associations of residential property owners and part-owners are governed by the Law on the ownership and part-ownership of residential buildings. According to those rules – which depart from the rule laid down in the Bürgerliches Gesetzbuch (German Civil Code), according to which an area of immovable property and a building erected on it, in principle, constitute one unit and have the same owner or owners – special ownership of separate apartments or of areas which are not used as living accommodation may be established. The former case refers to ownership, the latter to part-ownership. In addition to the special ownership of the apartment or the areas which are not used as living accommodation, a share in the joint ownership also always forms part of the ownership and/or part-ownership. Joint ownership includes, inter alia, the heating installation.

Brief summary of the basis for the reference

7 The referring court has doubts as to whether Paragraph 4.13 of the UStG is compatible with Directive 2006/112.

8 In accordance with the case-law of the Court of Justice, a Member State infringes EU law if it introduces and maintains a tax exemption which is not covered by EU law (judgment of 3 July 1997, *Commission* v *France*, C-60/96, EU:C:1997:340).

9 It is a matter of dispute in German legal literature whether an enabling basis exists under EU law for the tax exemption in Paragraph 4.13 of the UStG. While some authors are of the view that it is incompatible with Directive 2006/112 and therefore not applicable, others affirm its compatibility with EU law but follow a number of different lines of reasoning.

10 Some take the view that Article 135(1)(l) of Directive 2006/112, according to which Member States may exempt the leasing or letting of immovable property from tax, is a sufficient enabling basis. On the basis of its wording, however, the referring court does not consider that provision to be automatically applicable. The directive does not contain a definition of the concept of ‘leasing or letting of immovable property’. The Court of Justice has defined the concept as meaning that the owner of immovable property assigns to another person, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it. The Court has also stated that the terms used to describe the exemptions envisaged by Article 135(1), including the concepts of ‘leasing or letting of immovable property’, are to be interpreted strictly since those exemptions constitute exceptions to the general principle that VAT is to be levied

on all services supplied for consideration by a taxable person (judgment of 19 December 2018, *Mailat*, C-17/18, EU:C:2018:1038, paragraphs 36 and 37 and the case-law cited).

11 The view is also taken that Paragraph 4.13 of the UStG is covered by Statement No 7 to the Council's minutes concerning Article 13 of Directive 77/388, which provides: 'The Council and the Commission state that Member States may exempt ... the supply of heating and similar services by householders' associations to the householders themselves.' In part, the statement is directly regarded as an enabling basis, and in part as a clarification of Article 13.B(c) of Directive 77/388. The applicability of Directive 2006/112 is founded on Article 136(a), in conjunction with Statement No 1 to the Council's minutes relating to Directive 2006/112, which provides that, with regard to the earlier statement to Directive 77/388 and the successive amending directives, the Council and the Commission affirm that these are not affected by the repeal of those directives.

12 In the referring court's view, however, it is not possible to base Paragraph 4.13 of the UStG on Statement No 7 to the Council's minutes concerning Article 13 of Directive 77/388 or on Article 136 of Directive 2006/112 and Statement No 1 relating thereto. According to the case-law of the Court of Justice, a statement relating to Council minutes cannot be used for the purpose of interpreting a provision in the case where no reference is made to the content of the statement in the wording of the provision in question. The statement therefore has no legal significance (see, for example, judgments of 26 February 1991, *Antonissen*, C-292/89, EU:C:1991:80, and of 29 May 1997, *VAG Sverige*, C-329/95, EU:C:1997:256). The referring court does not, either in Article 13 of Directive 77/388 or in Article 136 of Directive 2006/112, find sufficient grounds pointing to any intention on the part of the legislature to exempt from tax the supply of heat by an association of residential property owners to those owners.

13 Finally, the view is expressed that there is no taxable transaction in the case of a service provided by an association of residential property owners to the owners. In part, the view is taken that the association of residential property owners does not operate as an economic operator, and in part the view is taken that there is no service provided for consideration. In that regard, the referring court explains that Statement No 7 to the Council's minutes concerning Article 13 of Directive 77/388 could be understood as meaning that the Commission and the Council did not regard, inter alia, the supply of heat by associations of residential property owners to such owners as an economic activity within the meaning of Article 4(1) and (2) of Directive 77/388, the provisions which preceded Article 9(1) of Directive 2006/112. If that point of view is followed, the right to a deduction of input tax is ruled out simply because the applicant is not a taxable person within the meaning of Articles 2(1)(a), 9(1) and 168 of Directive 2006/112. In that case, Paragraph 4.13 of the UStG would be superfluous and merely declaratory in nature.