

Case C-90/20**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:**

24 February 2020

Referring court:

Højesteret (Denmark)

Date of the decision to refer:

7 February 2020

Appellant

Apcoa Parking Danmark A/S

Respondent:

Skatteministeriet

Subject matter and legal basis of the reference

The reference for a preliminary ruling concerns whether control fees for infringement of regulations on parking on private property constitute consideration for a service supplied for the purposes of Article 2(1)(c) of Directive 2006/112 and there is therefore a transaction subject to VAT.

Article 267 TFEU.

Question referred

Must Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax be interpreted as meaning that control fees for infringement of regulations on parking on private property constitute consideration for a service supplied and that there is therefore a transaction subject to VAT?

The provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax sets out the scope of transactions subject to VAT (OJ 2006 L 347, p. 1, ('Directive 2006/112'); Article 2(1)(c), Article 24(1), Article 25, Article 135(1)(1) and (2)(b).

Case-law of the Court of Justice:

C-154/80, *Cooperatieve Aardappelenbewaarplaats* (EU:C:1981:38), paragraphs 12 and 14

C-16/93, *Tolsma* (EU:C:1994:80), paragraphs 13 and 14

C-277/05, *Société thermale d'Eugénie-les-Bains* (EU:C:2007:440), paragraphs 24 to 32 and 34 to 26

C-295/17, *MEO* (EU:C:2018:942), paragraphs 43 to 50, 57, 61 to 62 and 67 to 68

C-222/81, *B.A.Z Bausystem* (EU:C:1982:256)

Case 102/86, *Apple and Pear* (EU:C:1988:120)

C-40/09, *Astra Zeneca* (EU:C:2010:450)

C-250/14, *Air France-KLM and C-289/14, Hop!-Brit Air SAS* (EU:C:2015:841)

C-37/16, *SAWP* (EU:C:2017:22)

C-224/18, *Budimex* (EU:C:2019:347)

The provisions of national law relied on

The Momsloven (Law on VAT), codified by Consolidated Law No 1021 of 26 September 2019 on value added tax, as subsequently amended. Directive 2006/112 was implemented in Danish law by the Momsloven. Paragraph 4(1) of the Momsloven stipulates, inter alia, that VAT is to be paid on services supplied for consideration in Denmark. That provision implements Paragraph 2(1) of Directive 2006/112. The scope of the tax liability is laid down in Paragraph 27(1), under which the taxable amount is the consideration directly linked to the price of the goods or services exclusive of VAT. Paragraph 13(1), point 8, lays down a VAT exemption for, inter alia, letting and leasing of immovable property. The exemption does not apply, inter alia, to the letting of parking spaces.

The Færdselsloven (Law on road traffic), as codified by Consolidated Law No 1324 of 21 November 2018, as subsequently amended. A legislative amendment of 2014 (Law No 169 of 26 February 2014) incorporated a provision into Paragraph 122 c of the Færdselsloven, under which a penalty fee (control fee)

may be imposed in respect of parking on publicly accessible private land only if that is clearly indicated on site. The legislative amendment is based on, inter alia, a report of June 2013 on enhanced consumer protection in the field of parking, drawn up by a working group under the Ministry of Justice which was set up to consider, inter alia, whether there was a need to fix a maximum amount of penalty fees (that is to say in addition to the ordinary parking fee) which may be imposed on private parking spaces. It was concluded that there was no basis for laying down a fixed limit. In its considerations, the working group assumed that, when a motorist parks on private land, he enters, for all legal purposes, into a contract for parking (by a quasi-transaction) with the landowner, by which he accepts, from the outset, reasonable parking restrictions and conditions which are clear from the signage at the location concerned. According to that report, it depends on the contract-law interpretation and assessment of the parking conditions and the nature of the signage as to whether or not it will be justified, in a specific case, to charge a penalty fee which is — according to the report — for all legal purposes, a fine which the landowner/parking company imposes because the person parking failed to comply with the contract entered into.

Danish case-law:

In a judgment of 12 April 1996 (reproduced in *Ugeskrift for Retsvæsen* 1996 883 and *Tidsskrift for Skatter og Afgifter* 1996 357), the Højesteret (Supreme Court, Denmark) ruled on the nature, for the purposes of VAT, of ‘increased parking fees’ (control fees) for parking on private land in breach of the regulations. The Højesteret found that such increased fees, which are levied on the basis of a quasi-contractual relationship, had to be regarded as consideration for a service and thus as subject to VAT. The judgment stated that that was the case regardless of the fact that the fees were set at a standard rate, which was very high in comparison with the ordinary parking fee on account of the parking company’s desire to avoid any parking in breach of the regulations.

Subject of the action in the main proceedings

Appeal lodged by a private undertaking against a judgment, seeking, inter alia, a declaration that the control fees levied by it for infringement of the parking regulations — in the relationship between the individual motorist and the undertaking — do not constitute consideration for a service subject to VAT.

Brief summary of the facts and the procedure in the main proceedings

- 1 Apcoa Parking Danmark A/S (‘Apcoa’) is a private undertaking which operates a car park on private land under a contract with the site owner. Apcoa lays down conditions for use of the parking areas covering, for example, prohibition on parking without an individual permit, maximum parking time and payment for parking. Where the conditions are infringed, Apcoa levies a special ‘control fee’ (DKK 510 in 2008 and 2009).

- 2 The present case concerns whether or not Apcoa is obliged to pay VAT on those special control fees. It is common ground that Apcoa is liable for VAT in relation to any payment of parking fees which is made in accordance with the regulations.
- 3 On 25 October 2011 Apcoa applied to SKAT (the Danish tax authority) for a refund of VAT on sales in respect of control fees levied. The application related to charges paid from 1 September 2008 to 31 December 2009. The amount was assessed at DKK 25 089 292.
- 4 On 12 January 2012 SKAT refused the application on the ground that the control fees are regarded as subject to VAT under the Momsloven.
- 5 SKAT's decision was appealed before the Landsskatteretten (National Tax Tribunal), which, on 23 December 2014, upheld SKAT's decision. The Landsskatteretten concluded that there are 13 types of situation in which Apcoa Parking Danmark A/S levies an increased parking fee. In all these cases the motorist has parked and thus received a parking service. The Landsskatteretten noted inter alia that the judgment of the Court of Justice in C-277/05, *Société thermale d'Eugénie-les-Bains*, concerned the supply of hotel services and, in that regard, in particular, the situation where the client cancels the contract entered into for the supply of an agreed service. In that case, no service was ever supplied and the hotelier was able to retain the deposit lodged by the client as payment made by way of compensation for the hotelier's loss, without the imposition of VAT. The situation on which the Court of Justice ruled could not, in the view of the Landsskatteretten, change the conclusion reached in Danish law, inter alia, in a judgment of 1996. It ruled inter alia that in the situation relating to parking there is no cancellation of a contract with no link to the supply of a service or a comparable situation. The person parking receives — regardless of the unlawful circumstances (that is to say parking in breach of the regulations) — a parking facility. The Landsskatteretten therefore ruled that the control fees were subject to VAT.
- 6 Apcoa brought proceedings to challenge the decision of the Landsskatteretten (National Tax Tribunal) before the Retten i Kolding (District Court, Kolding, Denmark), which, by judgment of 23 January 2017, found in favour of the Skatteministeriet (Ministry of Taxation, Denmark). The Retten i Kolding referred to the judgment of the Højesteret (Supreme Court) of 1996 and upheld the ruling of the Landsskatteretten. The Retten i Kolding further referred to the report of the working group within the Ministry of Justice and found that the working group's considerations on the character of the control fee as a fine were not relevant in so far as they relate solely to the contract-law interpretation and assessment of the parking conditions and the nature of the signage.
- 7 Apcoa brought an appeal against the judgment of the Retten i Kolding (District Court, Kolding) before the Vestre Landsret (Western Court of Appeal, Denmark), which upheld the judgment of Retten i Kolding (District Court, Kolding) with reference to the same grounds as those stated by the Landsskatteretten (National

Tax Tribunal) and the Retten i Kolding, including in particular with reference to the judgment of the Højesteret (Supreme Court) of 1996 and the fact that, in all cases, for the control fee to be levied, the motorist must have parked and thus actually used the area of the parking space for his vehicle for a given period of time and there is therefore a direct link between the parking and the payment of the amount. The Vestre Landsret therefore found that the amount levied on the basis of a quasi-contractual relationship must be regarded as consideration for a service within the meaning of Paragraph 4(1) of the Momsloven. In addition, the Vestre Landsret stated that the guidance which can be derived from the case-law of the Court of Justice after the judgment of the Højesteret on the term 'supply for consideration', including in Case C-277/05, *Société thermale d'Eugénie-les-Bains*, does not mean that the state of the law established by the Højesteret in its judgment of 1996 cannot be maintained.

- 8 The judgment of the Vestre Landsret has now been appealed before the Højesteret by Apcoa, which claimed inter alia that the Skatteministeriet should acknowledge that the control fees which Apcoa levied for infringement of the parking regulations — in a relationship between the individual motorist and Apcoa — do not constitute consideration for a service subject to VAT. The Skatteministeriet contended that the judgment of the Vestre Landsret should be upheld. The case before the Højesteret concerns only Apcoa's obligation to pay VAT on the control fees levied by Apcoa in respect of the motorists concerned.

Principal arguments of the parties in the main proceedings

- 9 **Apcoa** argued in particular that the control fees are not a consideration for the continued right to park. On the contrary, the reason for them is Apcoa's desire to avoid any parking in breach of the regulations and they are a fine which the motorist must pay for having infringed the conditions governing parking. Furthermore, the fees are paid at a standard rate with no specific economic link to the value of a parking service.
- 10 In Apcoa's view, there is no supply of services for consideration. Therefore, the present case is not such as is covered by Paragraph 4(1) of the Momslov or Article 2(1)(c) of Directive 2006/112.
- 11 From the case-law of the Court of Justice, Apcoa highlighted in particular the judgment of 8 July 2007 in Case C-277/05, *Société thermale d'Eugénie-les-Bains*.
- 12 **The Skatteministeriet** argued in particular that, as consideration for the payment of the control fee, the motorist is actually provided with a parking space. The fact that the motorist has 'acquired' a parking space in breach of the regulations and consequently has to pay the control fee is irrelevant. There is therefore a direct link between the levying of the control fee and the parking itself. In 2009 the control fees made up around 34% of Apcoa's net turnover and thus form a significant part of its economic activity.

- 13 In the view of the Skatteministeriet, there is therefore a supply for consideration. The present case is thus one which is covered by Paragraph 4(1) of the Momslov and Article 2(1)(c) of Directive 2006/112.
- 14 From the case-law of the Court of Justice, the Skatteministeriet highlighted in particular the judgment of 22 November 2018 in Case C-295/17, *MEO*.

Brief summary of the reasons for the referral

- 15 The control fee for failure to comply with parking regulations on private land has hitherto been regarded in Danish law as subject to VAT under the Momsloven. It may be concluded that the obligation to pay the penalty fee is based on a quasi-contractual relationship and there is therefore a legal relationship between Apcoa and the person parking, as referred to, inter alia, in paragraph 14 of the judgment of 3 March 1994 in Case C-16/93, *Tolsma*.
- 16 The parties disagree as to whether or not there is the requisite mutual exchange of services.
- 17 The Court of Justice does not appear previously to have ruled on the nature of control fees for the purposes of VAT law. The Højesteret (Supreme Court) considers that, in the light of the wording of Article 2(1)(c) of Directive 2006/112, in conjunction with the case-law of the Court of Justice, there is uncertainty as to whether that provision should be interpreted as meaning that such charges constitute consideration for a service subject to VAT.
- 18 During the proceedings, information was submitted which indicates that the tax authorities in the United Kingdom, Sweden and Germany take the view that control fees for infringement of parking conditions on private land are not subject to VAT.
- 19 Since clarification of the issue is crucial to the outcome of the present case and the uncertainty concerns the interpretation of a rule of EU law, the Højesteret (Supreme Court) considers that it is necessary to ask the Court of Justice to answer the question referred.