



Appeal number TC/2018/03264

**IN THE FIRST TIER TRIBUNAL
(TAX CHAMBER)**

BETWEEN:

GE AIRCRAFT ENGINE SERVICES LIMITED

Appellants

- and -

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

ORDER

UPON reading the Notice of Appeal, the Grounds of Appeal, the Statement of Case, the Statement of Agreed Facts, the Witness Statements of Michael Loten, Phillip Morgan and Frances Eng, the skeleton arguments and other written submissions of the parties;

AND UPON hearing Counsel for the parties;

THE TRIBUNAL:

MAKES the findings of fact set out in Schedule C; and

ORDERS THAT:

1. The questions set out in the attached Order for Reference at Schedule A shall be referred to the Court of Justice of the European Union ("CJEU") for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union.
2. This Order and Schedules A, B, and C hereto shall be sent to the CJEU forthwith, without waiting for any period for appeal to expire.
3. All further proceedings shall be stayed until the CJEU has given its preliminary ruling on the questions set out in Schedule A hereto or until further order.

Dated this 11 day of November 2020

SCHEDULE A

REQUEST FOR PRELIMINARY RULING FROM THE COURT OF JUSTICE OF THE EUROPEAN UNION

Introduction

1. By this request for a preliminary ruling, the First Tier Tribunal (Tax Chamber) asks the Court of Justice of the European Union ("CJEU") to clarify the scope of the provision contained in Article 26(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (the "Principal VAT Directive").

Parties

2. The Commissioners for Her Majesty's Revenue and Customs ("HMRC") are responsible for the collection and management of value added tax in the United Kingdom.

3. GE Aircraft Engine Services Limited ("GEAES") carries on business in the United Kingdom relating to aircraft engines. It is a member of the General Electric group of companies ("GE"). Nineteen other members of the GE group have been assessed by HMRC to value added tax in similar circumstances to those applying to GEAES, and this appeal is being treated as the lead case for all 20 appeals.

Summary of subject-matter of the dispute

4. The dispute relates to an assessment for undeclared output tax in relation to a reward programme that GEAES operated for its employees called the "Above & Beyond" programme, which involved the issue of retail vouchers to employees. The vouchers could be exchanged for goods or services at well-known retailers.

Relevant legislation

EU legislation

5. Article 26 of the Principal VAT Directive (under Title IV Taxable Transactions, Chapter 3 Supply of services) provides:

1. Each of the following transactions shall be treated as a supply of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;

(b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.

2. Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition.

Domestic legislation

6. The provisions found in Article 26 of the Principal VAT Directive have been implemented into UK law by paragraph 3 of the Value Added (Supply of Services) Order 1992 (SI 1993/1507), which provides as follows:

Subject to articles 6, 6A and 7 below, where a person carrying on a business puts services which have been supplied to him to any private use or uses them, or makes them available to any person for use, for a purpose other than a purpose of the business he shall be treated for the purposes of the Act as supplying those services in the course or furtherance of the business.

Summary of relevant facts

7. For the purposes of this reference for a preliminary ruling, the relevant facts, which are more fully set out at paragraphs [4] – [12] of the Statement of Agreed Facts and Issues attached as Schedule B, and the additional findings of fact set out in Schedule C, which can be summarised as follows.

8. At all relevant times, GEAES (in common with other companies within the GE group) operated a programme called "Above & Beyond", which was an employee recognition programme. Under the programme, any employee of GEAES (at any level) could nominate any other employee for acts which she or he considered deserved special recognition, in accordance with the requirements of the programme. The Above & Beyond programme was designed and implemented in order to encourage and reward excellent work and better behaviours by GEAES's employees.

9. There were different levels of award that could be made under the programme. A person making a nomination was required to select the appropriate level and provide information as to why the nominee had merited the award. The nomination would be subject to review and approval by the nominee's line manager. A sample of awards is audited by GE's Human Resources Department to ensure that awards are made in compliance with the requirements of the programme and reward employees fairly.

10. At the highest level of award, the nominee would be eligible for a cash payment. At the lowest level, the nominee would be given a non-financial reward in the form of a certificate. This appeal relates solely to awards at the intermediate levels, where the nominee is awarded a retail voucher.

11. The Above & Beyond programme was also used as a vehicle for delivering a reward to an employee at service anniversaries and other circumstances.

12. If an award is approved, then the nominee is notified of her or his award. In the case of awards comprising retail vouchers, the nominee is sent a link to a website managed by Globoforce Limited ("Globoforce"). Although Globoforce is unrelated to GE, the website is "branded" with the GE brands.

13. The employee can select a retail voucher on the website from a range of listed retailers. Once selected, the voucher can only be redeemed at the selected retailer. The employee is sent an email confirmation of the voucher. Although Globoforce administer the provision of the vouchers, the vouchers are not issued by Globoforce.

14. The following steps were undertaken in the supply of the vouchers to the employee:

- (1) Globoforce purchased the vouchers directly from the relevant retailers and sold them to GE in the USA ("GE USA").
- (2) GE USA then sold them to another GE entity based in the USA ("GE HQ").

- (3) GE HQ would then make a cross-border supply of the vouchers to GE entities in the UK.
- (4) Each GE entity, such as GEAES, in its capacity as employer, provided the voucher to the nominated employee under the “Above and Beyond” programme.
- (5) GEAES (and the other GE UK entities) accounted for VAT in respect of the supply of the vouchers from GE HQ on the reverse charge basis and for the recovery of the corresponding input tax.
15. When the employee used the voucher to purchase goods or services, the retailer would have accounted for output tax on the value of the voucher.
16. HMRC contend that GEAES should also have accounted for output tax on the value of the voucher.
17. The First Tier Tribunal decided to stay the proceedings and refer questions to the CJEU for a preliminary ruling on the issues of the meaning and effect of Article 26(1)(b) of the Principal VAT Directive and the construction of the term "for his private use or for that of his staff or more generally for purposes other than those of his business". The First Tier Tribunal does not consider that the appropriate construction of these provisions is *acte clair*.

Reasons for the Order for Reference

18. The issue in this appeal is whether the three conditions are satisfied for a supply to be treated as a supply of services for consideration under Article 26(1)(b) of the Principal VAT Directive, so that GEAES is subject to output tax in respect of it.

19. These are:

- (a) Whether there is a supply of services;
- (b) Whether these services are supplied free of charge; and
- (c) Whether these services are supplied for the private use of the taxable person or its staff or more generally for purposes other than those of its business.

20. It is common ground between the parties (and the Tribunal agrees) that conditions (a) and (b) above are satisfied, leaving only condition (c) in dispute in this appeal. GEAES argues that the supply of vouchers is solely for the purpose of its business and therefore Article 26(1)(b) does not apply. HMRC take the opposite view.

21. The First Tier Tribunal considers that there is real doubt as to the correct construction and application of the term “for his private use or for that of his staff or, more generally, for purposes other than those of his business” within the meaning of Article 26(1)(b) of the Principal VAT Directive in the circumstances of this appeal.

22. The parties distinguish between the purpose of the employer in providing vouchers to the employees, and the use to which the employee puts the voucher. These divergent approaches to the interpretation of Article 26(1)(b) do not appear to have been resolved by the decisions of the CJEU in *Julius Fillibeck Söhne GmbH&Co. KG v Finanzamt Neustadt* (C-258/95) [1998] STC 513 (“*Fillibeck*”), *Danfoss A/S and another v Skatteministeriet* (C-371/07) [2009] STC 701 (“*Danfoss*”), and *Astra Zeneca UK Ltd v HMRC* (Case C-40/09) [2010] STC 2298 (“*Astra Zeneca*”) in circumstances such as those that pertain in this appeal.

Summary of the parties' arguments

Arguments advanced by GEAES

23. GEAES says that no standard rated supply arises by reason of the operation of Article 26(1)(b). Rather, the Above and Beyond program is an overhead of GEAES's economic activities in the UK, and any benefit to staff is secondary.

24. GEAES draw a distinction between GEAES's *purpose* in providing vouchers to their staff, and the (private) use of the voucher *by* the staff member. As GEAES has a business purpose for providing vouchers to its staff, it asserts that the provision of the voucher is outside of the scope of Article 26(1)(b), and there is no taxable supply of services.

25. GEAES assert that this approach to the interpretation of Article 26 is consistent with the decisions of the CJEU in *Danfoss* and *Fillibeck*, as the core objective of the taxpayer (in the provision of sandwich vouchers or the provision of free transport) was to ensure the smooth running of its business. Any private use of the supply was secondary. GEAES submit that the same arguments apply in this appeal. GEAES distinguish the circumstances in *Astra Zeneca*, as in that case, the staff had a choice as to whether (or not) to sacrifice salary in exchange for vouchers – whereas in the case of intermediate level awards under the Above & Beyond programme, the staff member was not given the choice of either receiving cash or receiving vouchers – only vouchers are available.

Arguments advanced by the Commissioners for HM Revenue & Customs

26. HMRC assert that Article 26(2)(b) applies, as the vouchers supplied to staff are provided for their private use - they are provided for their personal consumption outside the GEAES's business. The supply of the vouchers to staff therefore satisfies all the conditions for the application of Article 26(1)(b) so that output tax is due on this supply. HMRC assert that the fact that GEAES may have some business purpose in providing the vouchers to staff is irrelevant. In other words, HMRC assert that because the requirements of Article 26(1)(b) as to the private use by staff are met, there is no need to consider whether the vouchers might be supplied for a business purpose.

27. HMRC submit that the provisions of Article 26 have to be construed objectively, and therefore it is irrelevant what GEAES considers the purpose of the provision of the vouchers to be.

The questions referred

28. In the light of Article 26(2)(b) of Council Directive 2006/112/EC ("the Principal VAT Directive"), the First Tier Tribunal (Tax Chamber) respectfully refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

(1) Does the issue of vouchers for third party retailers to employees by a taxable person as part of a recognition programme for high performing employees constitute a supply "for his private use or for that of his staff or, more generally, for purposes other than those of his business" within the meaning of Article 26(1)(b) of the Principal VAT Directive?

(2) Does it have any significance in answering question 1 that the taxable person has a business purpose for the issuing of the retail vouchers to staff?

(3) Does it have any significance in answering question 1 that the retail vouchers issued to staff members are for their own use and can be used for the staff members' private purposes?